INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

DISPUTE REGARDING NAVIGATIONAL AND RELATED RIGHTS

(COSTA RICA *v.* NICARAGUA)

VOLUME III

Counter-Memorial of Nicaragua;
Reply of Costa Rica

COUR INTERNATIONALE DE JUSTICE

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The documents relating to the case are being published in the following order:

Volume I. Application; Memorial of Costa Rica.
Volume II. Memorial of Costa Rica *(continuation)*.
Volume III. Counter-Memorial of Nicaragua; Reply of Costa Rica.
Volume IV. Reply of Costa Rica *(continuation)*; Rejoinder of Nicaragua.
Volume V. Rejoinder of Nicaragua *(continuation)*; Verbatim Records of the Hearings.

*

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The Hague, 2011.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 133 le 29 septembre 2005, a fait l'objet d'un arrêt rendu le 13 juillet 2009 (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 213).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant :

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Volume II. Mémoire du Costa Rica *(suite)*.
Volume III. Contre-mémoire du Nicaragua ; réplique du Costa Rica.
Volume IV. Réplique du Costa Rica *(suite)* ; duplique du Nicaragua.
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La Haye, 2011.

CONTENTS – TABLE DES MATIÈRES

Page

Counter-Memorial of Nicaragua (Vols. I and II) — Contre-mémoire du Nicaragua (vol. I et II)

INTRODUCTION 4

Section 1. The procedure and the jurisdiction of the Court 4
Section 2. The history and the background of the case 5
Section 3. The scope and the nature of the dispute. 9
Section 4. The structure of Nicaragua's Counter-Memorial 10

CHAPTER 1. BACKGROUND TO THE DISPUTE 12

Section 1.1. Geography of the San Juan de Nicaragua River 12
Reserves. 17

Section 1.2. The Treaty of Limits of 1858: historical background . . . 19

A. The San Juan River under Spanish rule (1527-1821) 21
B. The post-independence and federal period (1821-1838) 23
C. The post-federal period (1838-1848) 25
D. Period of internationalization of the dispute 28

i. First stage: the threat of England and her alliance with Costa Rica 29
2. Second stage: the transit route and the concession contracts granted by Nicaragua to U.S. concessionaires. 30
3. The Anglo-American Treaty: Clayton-Bulwer of 1850 31

E. Period of the national anti-filibuster war (1855-1857) 32
Conclusions 38

Section 1.3. Precedents and subsequent practice related to the 1858 Jerez-Cañas Treaty 41

A. Precedents to the 1858 Treaty 42

1. Treaties 42
2. Canalization contracts and related treaties signed before 1858. . 44

B. The Treaty of Limits of 15 April 1858 50
C. The period from 1858 to 1888 53
D. Period subsequent to 1888. 56
Conclusions 60

CHAPTER 2. NICARAGUA'S SOVEREIGNTY OVER THE SAN JUAN DE NICARAGUA RIVER 63

Section 2.1. Character, object and purpose of the 1858 Treaty 63

A. Introduction 63
B. The pertinent principles of treaty interpretation: reference to the object and purpose 66
C. The pertinent principles of treaty interpretation: the duty to construe a treaty as a whole 70
D. The evidence of the object and purpose of the Treaty of 1858 . . 71

Page

1. The negotiating history 71
2. The reflection of the dispute relating to Nicoya in the diplomatic history 77
3. The conclusion of the Treaty of 15 April 1858 80
   - *(a)* The title 80
   - *(b)* Preamble 80
   - *(c)* The text of the Treaty 81
   - *(d)* Diplomatic correspondence subsequent to the Treaty of 1858 82
   - *(e)* The Cleveland Award of 22 March 1888 and the report to the Arbitrator by George L. Rives, Assistant Secretary of State, of 2 March 1888 84
   - *(f)* The first award by the Umpire E. P. Alexander of 30 September 1897 85

E. The evidence of the object and purpose of the Treaty of 1858: the legal consequences 89

CHAPTER 3. THE CLEVELAND AWARD AND OTHER CONSIDERATIONS 100

Section 3.1. Interpretation of the 1858 Treaty in the Cleveland Award . 100

A. Introduction 100

1. Costa Rica's recognition of the Cleveland Award as definitive, binding and final 104
2. The Parties did not request President Cleveland to determine the meaning of "con objetos de comercio", nor did President Cleveland purport to do so 106
3. Costa Rica may navigate on the San Juan de Nicaragua River with vessels of the revenue service only to the extent necessary to the exercise of her right to navigate with articles of trade (con objetos de comercio). This right is not mentioned in the 1858 Treaty 111
4. Origin of the controversy over Costa Rica's navigation with vessels of the revenue service: the 1886 dispute between the Parties over Costa Rica's use of a national steamship to patrol the entire length of the San Juan River navigable by Costa Rica to conduct customs reconnaissance and surveillance 114
5. The restrictiveness of Costa Rica's rights to navigate with vessels of the revenue service is evident from the changes made by President Cleveland to the recommendations in the second part of Rives' report 121

Conclusions 128

Section 3.2. Other documents invoked by Costa Rica 130

Section 3.3. General international law 138

Conclusion 142

CHAPTER 4. NICARAGUA HAS NOT BREACHED COSTA RICA'S TREATY RIGHT OF NAVIGATION 144

Section 4.1. Costa Rica's right of free navigation under the Jerez-Cañas Treaty 144

Introduction 144

A. A right of free navigation, yes, but with articles of trade 148

Page
B. A right of navigation restricted to articles of trade (objetos de comercio) . . . 155
C. Exclusion of transport of passengers . . . 162
D. The right to land at any part of the Nicaraguan bank . . . 165

Section 4.2. The right of Costa Rica under the Jerez-Cañas Treaty as interpreted in the Cleveland Award . . . 166
A. Introduction . . . 166
B. Costa Rica's alleged rights of navigation for specific purposes . . 167
C. Costa Rica's alleged right of protection of commerce and revenue control . . . 169
D. Costa Rica's alleged rights and obligations to safeguard (guarda) the river and to contribute to its defence, as well as the defence of the common bays . . . 181
E. Costa Rica's alleged right to the re-supply of and transport of personnel to and from border posts and "other related rights". . . 184

Section 4.3. Costa Rica purports a right of navigation in the San Juan de Nicaragua River that is not granted by the Jerez-Cañas Treaty or by the Cleveland Award . . . 184

Conclusion . . . 195

CHAPTER 5. NICARAGUA HAS NOT BREACHED ANY OTHER RIGHTS ALLEGED BY COSTA RICA . . . 198

Section 5.1. Alleged breaches of an alleged customary right to fish . . 198
Section 5.2. Alleged breaches of an alleged right to re-supply border posts . . . 205
Section 5.3. Alleged breaches of the alleged right of Costa Rican vessels not to carry the flag of Nicaragua in the waters of the San Juan River 212

CHAPTER 6. COSTA RICA'S RESPONSE TO NICARAGUA'S POLICY OF COOPERATION AND GOOD NEIGHBOURLINESS . . . 214

Introduction . . . 214

Section 6.1. Nicaragua's general policy of cooperation . . . 214
A. Armed navigation . . . 215
B. Pleasure boating . . . 225

Conclusion . . . 227

Section 6.2. Nicaragua's facilitation of traffic on the river . . . 230

Conclusion . . . 238

CHAPTER 7. REMEDIES . . . 239

Section 7.1. The remedies requested by Costa Rica . . . 239
Section 7.2. Declaration requested by Nicaragua . . . 246

RESERVATIONS . . . 250

SUBMISSIONS . . . 251

Annexes to the Counter-Memorial of Nicaragua . . . 253

I. Treaties

Annex 1. Montealegre-Velasco Treaty. Granada, 16 August 1823 . . . 254
Annex 2. Montealegre-Solis Treaty. Leon, 9 September 1823 . . . 256

Page

Annex 3. Chamorro-Mayorga-White Convention. Granada, 14 August 1851 259
Annex 4. Marcoleta-Molina Preliminary Treaty. Washington, 28 January 1854 262
Annex 5. Cass-Irisarri Treaty. Washington, 16 November 1857 265
Annex 6. Zelaya-Volio Convention. San José, 13 July 1868 274
Annex 7. Rivas-Esquivel Convention. San José, 21 December 1868 . . . 276
Annex 8. Montealegre-Jiménez Interoceanic Canalization Treaty. San José, 18 June 1869 278
Annex 9. Alvarez-Zambrana Treaty of Limits. Granada, 5 February 1883 281
Annex 10. Navas-Castro Treaty of Limits. San José, 19 January 1884 . . 286
Annex 11. Roman-Esquivel-Cruz. Guatemala, 24 December 1886. . . . 290
Annex 12. Guerra-Castro Treaty of Limits. Managua, 23 December 1890 293
Annex 13. Matus-Pacheco-Lainfiesta Preliminary Treaty of Peace. Managua, 26 April 1898 297

II. Concessions

Annex 14. Zepeda-Juárez-White Canalization Contract. Leon, 27 August 1849 302
Annex 15. Irisarri-Stebbins Contract. New York, 19 June 1857. 309
Annex 16. Webster and Harris-Escalante Contract. San José, 14 July 1857 312
Annex 17. Zeledón-Rosa Pérez Contract. Managua, 30 December 1860 . 318
Annex 18. Molina-Morris Inter-Oceanic Transit Contract. Washington, 10 November 1863 321
Annex 19. F. A. Pellas Navigation Contract. Managua, 1 March 1877 . . 331
Annex 20. Cárdenas-Menocal Contract. Managua, 23 March 1887 . . . 333

III. Notes

Annex 21. Note from Lewis Cass, Secretary of State of the United States, to William Carey Jones, Special Agent of the United States to Central America. Washington, 30 July 1857 337
Annex 22. Note from Colonel Jorge Cauty, Diplomatic Representative of the Costa Rican Government, to Mr. Segundo Cuarezma, Commander of the San Carlos fort. San Carlos, 14 October 1857 341
Annex 23. Note from William Carey Jones, Special Agent to the United States to Central America, to Gregorio Juárez, Minister of Foreign Affairs of Nicaragua. Managua, 17 October 1857 343
Annex 24. Note from Pedro Rómulo Negrete, Minister Plenipotentiary of the Government of El Salvador, to Gregorio Juárez, Secretary for Foreign Affairs of Nicaragua, 6 May 1858 348
Annex 25. Note from Mirabeau B. Lamar, United States Minister resident to Nicaragua and Costa Rica, to Lewis Cass, Secretary of State of the United States. Managua, 28 May 1858 350
Annex 26. Note from Lorenzo Montúfar, Minister of Foreign Affairs of Costa Rica, to Anselmo H. Rivas, Minister of Foreign Affairs of Nicaragua. San José, 22 July 1872. 353
Annex 27. Message of Tomas Ayón, State Department of Nicaragua, to the Senate of Nicaragua, giving history of the boundary negotiation with Costa Rica. Managua, 8 January 1876 363
Annex 28. Note from Mr. Francisco Castellón, Minister of Foreign Affairs of Nicaragua, to Mr. Ascensión Esquivel, Minister of Foreign Affairs of Costa Rica. Managua, 5 June 1886 366

Page

Annex 29. Note from Mr. Ascensión Esquivel, Minister of Foreign Affairs of Costa Rica, to Mr. Francisco Castellón, Minister of Foreign Affairs of Nicaragua. San José, 31 October 1886 368
Annex 30. Note from Mr. José J. Rodríguez, Minister of Foreign Affairs of Costa Rica, to Mr. Francisco Castellón, Minister of Foreign Affairs of Nicaragua. San José, 11 November 1886 370
Annex 31. Note from Mr. Joaquín Elizondo, Minister of Foreign Affairs of Nicaragua, to Mr. Cleto Viquez, Minister of Foreign Affairs of Costa Rica. Managua, 14 February 1887 372
Annex 32. Note from Mr. Cleto González Viquez, Ministry of Foreign Affairs of Costa Rica, to Mr. Joaquín Elizondo, Minister of Foreign Affairs of Nicaragua. San José, 21 March 1887 375
Annex 33. Note from Mr. Pedro Pérez Zeledón, Chief of the Costa Rican legation in Washington, to Mr. Thomas F. Bayard, Secretary of State of the United States of America, 30 July 1887. 379
Annex 34. Telegram from Mr. Pedro González, Under Secretary for Home Affairs, to Mr. Ascensión Esquivel, Minister of Foreign Affairs of Costa Rica, 28 September 1887. 380
Annex 35. Note from Mr. Pedro Pérez Zeledón, Chief of the Costa Rican legation in Washington, to Mr. Thomas F. Bayard, Secretary of State of the United States of America, 23 March 1888. 381
Annex 36. Note from Mr. Pedro Pérez Zeledón, Minister of Foreign Affairs of Costa Rica, to Mr. Joaquín Elizondo, Minister of Foreign Affairs of Nicaragua. San José, 25 September 1888 382
Annex 37. Note from Mr. Ricardo Pacheco, Minister of Foreign Affairs of Costa Rica, to the Minister of Foreign Affairs of Nicaragua. San José, 9 August 1895 388
Annex 38. Note from Mr. Ricardo Pacheco, Minister of Foreign Affairs, to the Secretary to the Diet of the Greater Republic of Central America, 31 July 1897. 398
Annex 39. Note from Mr. Julio Martín, Director of Adena, to Mr. Alfonso Robelo, Ambassador of Nicaragua in Costa Rica. San José, 27 September 1993. 400
Annex 40. Note from Mr. Ernesto Leal, Minister of Foreign Affairs of Nicaragua, to Mr. Alfonso Robelo, Ambassador of Nicaragua to Costa Rica, 8 October 1993 402
Annex 41. Note from Mr. Bernd Niehaus, Minister of Foreign Affairs of Costa Rica, to Mr. Alfonso Robelo, Ambassador of Nicaragua to Costa Rica. San José, 15 March 1994 404
Annex 42. Note from Mr. Juan Rafael Lizano, Minister of Home Affairs, Police and Public Safety of Costa Rica, to Mr. José Antonio Alvarado, Minister of Home Affairs of Nicaragua. San José, 15 July 1998 . . . 406
Annex 43. Note from Mr. Walter Niehaus, Vice Minister of Foreign Affairs and Worship of Costa Rica, to Mr. Adán Guerra, Vice Minister of Foreign Affairs of Nicaragua. San José, 23 March 2000 408
Annex 44. Note from Mr. Roberto Rojas, Minister of Foreign Affairs and Worship of Costa Rica, to Mr. Francisco Xavier Aguirre, Minister of Foreign Affairs of Nicaragua. San José, 26 October 2000 410
Annex 45. Note from Mr. Roberto Tovar, Minister of Foreign Affairs and Worship of Costa Rica, to Mr. Norman Caldera, Minister of Foreign Affairs of Nicaragua. Alajuela, 26 September 2002. 412

Page
Annex 46. Note from Mr. Miguel León, President, Adena, to Mr. Mauricio Díaz Dávila, Ambassador of Nicaragua to Costa Rica. San José, 14 July 2003 414
Annex 47. Note from Mr. Roberto Tovar, Minister of Foreign Affairs and Worship of Costa Rica, to Mr. Norman Caldera, Minister of Foreign Affairs of Nicaragua. San José, 6 December 2004 416
Annex 48. Note from Mr. Miguel A. León, President, Directive Board, Adena, to Mr. Francisco Fiallos Navarro, Ambassador of Nicaragua to Costa Rica. San José, 27 May 2005 417
Annex 49. Note from Mr. Miguel A. León, President, Directive Board, Adena, to Mr. Francisco Fiallos, Ambassador of Nicaragua to Costa Rica. San José, 8 June 2005 419
Annex 50. Note from Mr. Norman Caldera, Minister of Foreign Affairs of Nicaragua, to Mr. Bruno Stagno, Minister of Foreign Affairs and Worship of Costa Rica. Managua, 2 June 2006 421
Annex 51. Note from Mrs. Thais Ching Zamora, Director, health unit of the Costa Rican Social Security Institute, to Mr. Leopoldo Ramírez, Ambassador of Nicaragua to Costa Rica. Puerto Viejo de Sarapiquí, 19 June 2006 423
Annex 52. Note from Mr. Rodrigo Zamora, Comunidad de Alianza Cristiana y Misionera de Horquetas, to Mr. Leopoldo Ramírez, Ambassador of Nicaragua to Costa Rica. Horquetas de Sarapiquí, 30 June 2006 . 425
Annex 53. Note from Mr. Leopoldo Ramírez, Ambassador of Nicaragua to Costa Rica, to Mrs. Thais Ching Zamora. San José, 6 July 2006 . . 427
Annex 54. Note from Mr. Leopoldo Ramírez, Ambassador of Nicaragua to Costa Rica, to Mr. Rodrigo Zamora, Comunidad de Alianza Cristiana y Misionera de Horquetas. San José, 6 July 2006 429

IV. Decrees

Annex 55. Decree of the Central American Federal Congress, approving the annexation of Nicoya to Costa Rica. 9 December 1825 430
Annex 56. Decree revoking the rights and privileges granted to the American Atlantic and Pacific Ship Canal and the Accessory Transit Company. Granada, 18 February 1856 431
Annex 57. Decree No. 139. Nicaragua accepts the war declared by Costa Rica. Managua, 19 October 1857 434
Annex 58. Decree ordering the commanders of ports and perfects of the frontiers of Nicaragua not to permit any foreign person to go into the interior of the country, unless presenting a passport issued by the respective ministers or consuls at the ports or places of their departure. Managua, Nicaragua, 11 September 1862 436
Annex 59. Presidential Decree 527, creating the Solentiname Archipelago National Monument. *Gazette No. 78.* 23 April 1990 439
Annex 60. Decree 28-94 declaring Nicaragua's southeast region a sustainable development territory. *Gazette No. 106.* 8 June 1994 443
Annex 61. Decree 66-99 updating and defining the categories and limits of protected areas located in Nicaragua's southeast territory. 31 May 1999 445

V. Constitutions and Constitutional Jurisprudence

Annex 62. Political Constitution of Costa Rica. 8 June 1917 (Art. 5) . . 454
Annex 63. Political Constitution of Costa Rica. 7 November 1949 (Art. 5) 455

Page

Annex 64. Jurisprudence regarding Article 46 of the 1949 Costa Rican Constitution 456
Annex 65. Political Constitution of Nicaragua. 9 January 1987 as modified in 1995 (Arts. 1, 138, numeral 12, 150, numeral 8 and 182) . . . 459
Annex 66. Judgment of the constitutional chamber of the Supreme Court of Costa Rica. Exp: 00-007391-0007-CO-RES: 2001-08239. San José, 14 August 2001 461

VI. Laws and Resolutions

Annex 67. Law No. 7410. General Law of the Costa Rican police (Art. 24). San José, 26 May 1994 464
Annex 68. Resolution of the Republic of Nicaragua's National Assembly on the Joint Communiqué Cuadra-Lizano, 30 July 1998. Ordinary session No. 5. Managua, 18 August 1998 465

VII. Awards, Judgments and Related Documents

Annex 69. *Reply of the Republic of Nicaragua to the Case of the Republic of Costa Rica Submitted to His Excellency Hon. Grover Cleveland, President of the United States*. Washington, 1887, p. 49 467
Annex 70. George L. Rives report. 2 March 1888 469
Annex 71. George L. Rives report (second). 2 March 1888 475
Annex 72. Draft award prepared by G. L. Rives and handed to the Arbitrator Mr. Grover Cleveland. 17 March 1888 480
Annex 73. Alexander, Engineer-Arbitrator: Award No. 4. San Juan del Norte, Nicaragua, 26 July 1899 488

VIII. Books

Annex 74. "Objeto" *Diccionario de la lengua castellana por la real academia española*. 10 edición, Madrid, Imprenta nacional, 1852 . . 497
Annex 75. *Yearbook of the Ministry of Foreign Affairs of Costa Rica*. 1888 (pp. 3-4) 498
Annex 76. *Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica*. 1900 (pp. 10-11) 499
Annex 77. De Peralta, Manuel M. *Historia de la jurisdicción territorial de la República de Costa Rica*. Madrid, 1891 (p. 38) 500
Annex 78. *Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica*. 1998-1999 (p. 35) 501
Annex 79. *Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica*. 2001-2002 (pp. 143-144) 502

IX. Press Reports

Annex 80. "Nicaragua y Costa Rica". Edición del Centroamericano. 24 October 1857 (Nicaragua and Costa Rica) 503
Annex 81. "País obligado a integrarse". Costa Rican newspaper *La Nación*. San José, 19 May 2002 (country forced to integrate) 505
Annex 82. "Tovar reconoce soberanía nica". Nicaraguan newspaper *La Prensa*. Managua, 18 February 2005 (Tovar recognizes Nicaraguan sovereignty) 507
Annex 83. Communiqué of the Ministry of Foreign Affairs and Worship of Costa Rica: "Costa Rica announces filing of application, before the International Court of Justice, on her rights of navigation on the San Juan River". San José, 28 September 2005 508

Page

Annex 84. Text from the national radio and television chain addressed by the President of the Republic [of Costa Rica], Dr. Abel Pacheco. 2 October 2005 510
Annex 85. "Gobierno desechará armas de guerra". Periódico *La Nación*, San José, 6 June 2006 (Government will destroy its military armament) 513

X. Other Documents

Annex 86. Royal Charter to Diego Artieda. El Pardo, 1 December 1573 . 515
Annex 87. Mr. Francisco Maria Oreamuno, Diplomatic Mission in Nicaragua (instructions). San José, 26 July 1838 519
Annex 88. Propositions Webster-Crampton. Washington, 30 April 1852 . 524
Annex 89. Authorization to navigate issued by the embassy of Nicaragua in Costa Rica. San José, 6 July 2006, No. 1 529
Annex 90. Authorization to navigate granted embassy of Nicaragua in Costa Rica on behalf of Ministry of Foreign Affairs of Nicaragua. San José, 6 July 2006, No. 2 531
Annex 91. Affidavits of Colonel Ricardo Sánchez. 7 December 2006 . . 533

Reply of Costa Rica (Vol. I) — Réplique du Costa Rica (vol. I)

SKETCH MAPS

1. Navigation of the *Adela* Steamer, March 1892 544
2. Boca San Carlos 694
3. Costa Rican communities connected by the San Juan River 713
4. Limits of Costa Rica and Lataguzgalpa according to the Royal Charter of the King of Spain to Diego Lopez, 10 February 1576 753

CHAPTER 1. INTRODUCTION 538
- A. Introductory comments 538
- B. Nicaragua's Counter-Memorial 539
- C. Key issues 546
- D. The issues for the Court 550

CHAPTER 2. GENERAL INTERNATIONAL LAW RELEVANT TO THE DISPUTE . . . 552
- A. Introduction 552
- B. The San Juan as an international river 552
  - 1. Nicaragua's position 552
  - 2. The applicable law 554
  - 3. The San Juan as a boundary river 558
    - *(a)* The nature of the boundary in the lower San Juan area . . . 558
    - *(b)* The practice of establishing boundaries on riverbanks . . . 560
  - 4. The San Juan as an international river 565
    - *(a)* Elements traditionally associated with international watercourses 565
    - *(b)* Consequences of the San Juan River's characterisation as an international boundary river 566
    - *(c)* Conclusions 566
- C. The applicable principles of interpretation 567
  - 1. All principles of interpretation confirm Costa Rica's views . . . 567
  - 2. Nicaragua's focus on sovereignty and its invocation of a restrictive interpretation of the right of free navigation 572

Page

3. Costa Rica's right of navigation on the San Juan was simultaneous with the establishment of Nicaraguan sovereignty over the waters of the river 575

D. Conclusions 578

CHAPTER 3. THE SCOPE OF COSTA RICA'S SUBSTANTIVE RIGHTS 579

A. Introduction 579

B. A perpetual right of free navigation 580

1. Costa Rica's right is *perpetual* 581
2. Costa Rica's perpetual right of navigation is *free* 581
3. Costa Rica's right of navigation is not "imperfect" 590

C. "Con objetos de comercio" 591

1. "Con objetos de comercio" means "for purposes of commerce" . 592
2. The scope of the term "comercio" in the Treaty of Limits . . . 604
3. Navigation "con objetos de comercio" includes transport of persons 604

D. Public rights of protection, custody and defence 606

1. Applicable law 606
2. Nicaragua's position 607
3. Costa Rica's position 609
4. Conclusion 613

E. Related rights 613

1. Flags 614
   (*a*) Flag issues as "related rights" 614
   (*b*) Nicaragua's position 614
   (*c*) Costa Rica's position 615
   (*d*) Analysis 616
2. Fisheries 617
   (*a*) Fisheries as a "related right" 617
   (*b*) The existing practice and its character 618
   (*c*) Conclusion 620
3. Landing rights 621
4. Facilitation of traffic 623

F. The issue of "border courtesy" 625

1. What is meant by "border courtesy"? 625
2. Nicaragua's strategy of denial 625
3. Analysis of some arrangements and practices 627
   (*a*) The right of navigating public armed vessels 627
   (*b*) The Cuadra-Castro Joint Communiqué of 8 September 1995. 628
   (*c*) The Cuadra-Lizano Joint Communiqué of 30 July 1998 . . . 629
   (*d*) Presidential letters exchanged on 28 and 29 June 2000 . . . 630
   (*e*) The requests for permission to navigate made in 2006 . . . 632

G. Conclusions 633

Table 1. Use of the term "objetos" as meaning "purposes" in 19th century documents 635

Table 2. Terms used to refer to articles of trade, goods, things, etc., in 19th century documents 663

Page
CHAPTER 4. NICARAGUA'S BREACHES . . . 688
A. Introduction . . . 688
B. Breaches of Costa Rica's perpetual right of free navigation . . . 690
1. The obligation to land at the Nicaraguan bank and payment for a "departure clearance certificate" . . . 690
2. Other charges . . . 692
3. Visas and passports . . . 695
4. Timetables . . . 698
5. Searches . . . 699
C. Breaches of Costa Rica's right of navigation "for purposes of commerce" . . . 702
D. Breaches of Costa Rica's right of protection of commerce, safeguard, defence and re-supply of border posts . . . 715
E. Breaches of Costa Rica's related rights . . . 717
1. Flags . . . 717
2. Fisheries . . . 718
3. Landing rights . . . 719
4. Facilitation of traffic on the river . . . 720
F. Nicaragua's plea of acquiescence . . . 721
1. Measures relating to tourism arising from the Memorandum of Understanding of 5 June 1994 . . . 721
2. Navigation of Costa Rican police on the river . . . 722
3. Allegations that Costa Rica recognises the need to obtain permission to navigate on the San Juan . . . 724
G. Conclusions . . . 726
CHAPTER 5. REMEDIES . . . 730
A. Costa Rica's entitlements . . . 730
1. Nicaragua's claim that Costa Rica seeks to exercise diplomatic protection . . . 730
2. Assurances and guarantees of non-repetition . . . 733
3. Compensation . . . 736
B. Nicaragua's request for a declaration . . . 740
SUMMARY . . . 744
SUBMISSIONS . . . 747
APPENDIX: SOME HISTORICAL ISSUES . . . 749
A. The lower San Juan River and its mouths . . . 749
B. The issue of Nicoya . . . 754
C. The 1825 and 1841 Constitutions . . . 757
D. Negotiations for an inter-oceanic canal . . . 759
E. Costa Rican navigation on the San Juan River after 1888 . . . 760
F. Conclusions . . . 765
CERTIFICATION . . . 767

COUNTER-MEMORIAL OF NICARAGUA

CONTRE-MÉMOIRE DU NICARAGUA

DISPUTE CONCERNING
NAVIGATIONAL AND RELATED RIGHTS
(COSTA RICA v NICARAGUA)

COUNTER - MEMORIAL
OF THE REPUBLIC OF NICARAGUA

VOLUME I

29 May 2007

INTRODUCTION

Section 1
The Procedure and the Jurisdiction of the Court

1 On 29 September 2005, Costa Rica filed an Application before the Court by which she requested the Court "to adjudge and declare that Nicaragua is in breach of its international obligations ... in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan River"[1].

2 Costa Rica filed her *Memorial* on 29 August 2006, within the time-limit fixed by the Court's Order of 29 November 2005. The present *Counter-Memorial* is filed in accordance with the same Court's Order which fixed 29 May 2007 as the time-limit for its deposit.

3 In her *Memorial*, Costa Rica bases the jurisdiction of the Court on "the declarations of acceptance made respectively by the Republic of Costa Rica dated 20 February 1973, and by the Republic of Nicaragua dated 24 September 1929" combined with the Tovar-Caldera Declaration of 26 September 2002 and on Article XXXI of the American Treaty on Pacific Settlement of Disputes, Bogotá, of 30 April 1948 (the Pact of Bogotá)[2]. Nicaragua does not take issue with these assertions and fully accepts the Court's jurisdiction in the present case.

4 However, Nicaragua wishes to make very clear that while she accepts the jurisdiction of the Court, she nevertheless considers that the issues raised

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[1] CRM, para. 12.

[2] CRM, p. 3, para. 1.09.

by Costa Rica have already been settled by the 1858 Treaty and the 1888 Cleveland Award.[3] The 1886 treaty by which the parties submitted the dispute to President Cleveland provides in Article VII that the award "shall be held to be obligatory between the contracting parties. No other recourse shall be admitted."[4] Costa Rica should thus not be permitted to raise again matters that have already been decided.

Section 2
The History and the Background of the Case

5. Soon after the Spanish arrived in America and explorer Vasco Nuñez de Balboa discovered the Pacific Ocean in 1513, the search for a natural waterway or strait that would connect both Oceans began. One of the most promising candidates for having this natural channel between the Oceans was thought to be Nicaragua with her huge Lake and her outlet to the Atlantic, the San Juan de Nicaragua River.

6. This possibility of finding a natural channel through Nicaragua and then as a most favourable site for the cutting of an interoceanic canal, made Nicaragua a most coveted prize by foreign powers and her immediate neighbours. As was acutely observed by an American Diplomat early in the 20th Century, in all the international controversies of Nicaragua the true cause of the problem was the desire to control the route of the interoceanic channel.[5]

7. Costa Rica's interest became manifest immediately after independence from Spain in 1821. Although the principle of *uti possidetis iuris* was

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[3] See below, Chap. 3, Sec. 1 and Chap. 4.
[4] CRM, Vol. 2, Annex 14.
[5] See para. 1.2.26 below.

supposed to rule the division of the colonial territories, Costa Rica took advantage o a civil war raging in Nicaragua and annexed an important part of Nicaragua called Nicoya. The annexation of this territory brought Costa Rica closer to the coveted shores of the Lake of Nicaragua which, added to her post-colonial claim of shared sovereignty over its outlet, the San Juan River, made Costa Rica see herself as the sovereign over any canal route through this natural waterway or, at the very least, a necessary partner in any such enterprise.

8. In 1857, after Nicaragua was prostrated by a war against foreign invaders, Costa Rica took over control of the Lake and River route through Nicaraguan territory. This was seen by Nicaragua as a *casus belli* and declared war on Costa Rica. This declaration of war prompted the Parties to reach an agreement, an agreement that Nicaragua considered would at long last put an end to Costa Rica's attempts to take over or to at least be considered co-sovereign over the San Juan River. The Agreement was the 1858 Jerez- Cañas Treaty of Limits.

9. Nicaragua will come back in some details on the circumstances of the conclusion of the Treaty of Limits later in this *Counter-Memorial.*[6] It is however in order to recall out of hand that, in exchange for her full sovereignty over the waters of the San Juan River, Nicaragua made very significant concessions since she gave up her well founded claims over the district of Nicoya and the areas south of the San Juan River which appertained to Nicaragua on the basis of the principle of *uti possidetis iuris*[7]. The other element of the *quid pro quo* precisely was the limited

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[6] See e.g., Sections 1.2 and 1.3.

[7] See the Report to the arbitrator, the President of the United States, by George L. Rives, Assistant Secretary of State, 2 March 1888. NCM, Annex 70.

right of navigation with articles of trade (con objetos de comercio) granted by Nicaragua to Costa Rica on the lower part of the San Juan River as defined by Article 6 of the Treaty[8].

10. Thirty years later, coinciding with negotiations between Nicaragua and the United States for the building of the interoceanic canal through Nicaragua, Costa Rica revived the dispute on her navigational rights in the San Juan River by attempting to patrol the waterway with a war ship. The crisis brought about by this incident, together with Nicaragua's claim that the 1858 Treaty was not valid because it violated her Constitution, prompted the Parties to authorize the President of the United States to arbitrate on the issue of its validity and of the limits of certain rights of navigation in the San Juan River. President Cleveland brought in his award on 22 March 1888.

11. Since both Parties have accepted the Cleveland Award as binding and final, it could have been expected that it had put a final end to the dispute over the validity and scope of the Treaty of Limits. This has been the position of Nicaragua – unfortunately not of Costa Rica which has constantly endeavoured to expand the rights she derives from the Treaty.

12. In fact, Costa Rica's application purely and simply aims at reviving the case which was brought before the President of the United States and to obtain from the International Court what she could not get from the President of the United States 120 years ago.

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[8] The Treaty of Limits is reproduced as CRM, Vol. 2, Annex 7, pp. 54-60.

13. In a nutshell, Costa Rica seeks, once again,[9] to broaden her rather limited right to navigate with articles of trade (con objetos de comercio) on the River San Juan in order to obtain an almost unrestricted right of navigation for whatever purpose and with any type of vessels.

14. However, as is clear from the text of the Treaty itself and from its interpretation by President Cleveland, no such right has ever been granted to Costa Rica by Nicaragua, not even remotely.

15. One hundred and twenty years ago, Costa Rica sought to navigate the San Juan with ships of war. The Cleveland Award denied Cost Rica this right. This time around since it could not claim a right to navigate with war ships as such, it resuscitates this long buried issue by claiming rights of navigation with armed military personnel.

16. In light of the foregoing, it is perhaps fitting to conclude this section with a quotation from a former President of Costa Rica. President Abel Pacheco made the following declarations to the Costa Rican newspaper *La Nación*, which it published on 19 May 2002: "We must understand that it is absurd that a country with no army is fighting over the passage of armed persons on a navigable river that is drying up… So, what's this row about?"[10]

17. The present case ("this row") is about a new avatar of the traditional Costa Rican strategy of seeking to erode Nicaragua's sovereignty over the San Juan de Nicaragua River.

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[9] Cf. infra, para. 14.

[10] NCM, Annex 81. La Nación, 19 May 2002, "País debe integrarse" [Country forced to integrate], section subtitled: "Pacheco a dialogo informal por el río" [Pacheco to Take Part in Informal Dialogue Over River].

Section 3
The Scope and the Nature of the Dispute

18. Costa Rica's presentation of the "Scope of the Dispute"[11] and of "The Dispute before the Court"[12] is biased in many respects which will be explained more fully in the body of this *Counter-Memorial*.

19. The cornerstone of the present dispute, as revealed by its historical background, is, no more and no less, the 1858 Treaty of Limits and its interpretation in respect to the navigational rights granted in this legal instrument to Costa Rica. The allegations of the Applicant with regard to the violations of the 1858 Treaty, and in particular of its Article VI, stand or fall with the interpretation of this legal instrument and the subsequent Cleveland Award which already settled this salient question some 120 years ago. Indeed, and this is not frontally questioned by the Applicant, the San Juan River is under the sovereignty of Nicaragua. This case is not about "navigation on international waterways" and the international law general rules regulating those activities are of no help, contrary to the allegations of the Applicant[13]. It is for the Court to determine if the acts and/or omissions of Nicaragua alleged by the Applicant may constitute violations of the obligations imposed to Nicaragua under the special regime of the 1858 Treaty. This is consequently a case about a treaty, its interpretation and its application.

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[11] CRM, Introduction, pp. 1-3.

[12] CRM, Chap. 3, pp. 27-.45.

[13] CRM, p. 155, para. A19.

Section 4
The Structure of Nicaragua's *Counter-Memorial*

20. The *Counter-Memorial* will be structured according to the schema indicated below. Part of the *Counter-Memorial* will consist of Annexes containing documents cited in the text. Nicaragua does not have at present original or copies certified as accurate of some of the documents cited. The national archives of Nicaragua have been ravaged by two major earthquakes last century and the wanton destruction of some of her main cities by invaders since the time of Independence. Therefore, some of the documents cited in the text will be referred to those filed by Costa Rica in her *Memorial*. Hence, Nicaragua reserves the right to produce in due course other more accurate versions of these instruments if they should be so found. Furthermore, in some cases, these documents filed by Costa Rica are accompanied by inaccurate translations of the text or certain parts of the text that had previously not been disputed and hence little interest was placed on its correct translation. In these cases, there is an indication of Nicaragua's position on this question. The most salient of these inaccuracies of translation is that of the phrase used to describe the type of navigation rights granted to Costa Rica in the San Juan River. Thus the phrase "con objetos de comercio" contained in the Treaty of Limits of 1858 is loosely translated as "with purposes of commerce" and not its accurate meaning of "with objects of commerce" or "with articles of trade". Since the question had not been at issue during the Cleveland Arbitration in 1888 and only in recent times has become an issue, little attention had been placed on this discrepancy.

21. **The schema of Nicaragua's *Counter-Memorial* is as follows:**

Chapter 1 addresses the background to the dispute. This Chapter is divided in three sections: The first section is the geography of the San Juan de Nicaragua River, the second, the historical background in general, and the third, the precedents and subsequent practice related to the 1858 Jerez-Cañas Treaty.

Chapter 2 reaffirms Nicaragua's sovereignty over the San Juan de Nicaragua River according to the 1858 treaty.

Chapter 3 analyses the Cleveland award and other considerations related to the dispute.

Chapter 4 demonstrates that Nicaragua has not breached Costa Rica's right of navigation under the 1858 Treaty.

Chapter 5 continues explaining that Nicaragua has also not breached any other rights alleged by Costa Rica.

Chapter 6 explains Costa Rica's response to Nicaragua's policy of cooperation and good neibourliness.

Chapter 7 contains the Remedies and declarations requested by Nicaragua.

And, finally, a note on certain Reservation of rights made by Nicaragua and then the Submissions.

CHAPTER 1
BACKGROUND TO THE DISPUTE

Section 1.1
Geography of the San Juan de Nicaragua River

1.1.1 The purpose of this section is to describe the current status of the San Juan de Nicaragua River, including the present day situation of the historical bay at its mouth, and the difficulties for navigation at the lower end of its course, as well as the presence of large Natural Reserves on its margins and the impact of all of this on the scarce riparian population.

1.1.2 The San Juan de Nicaragua River, also known as the Desaguadero ("the drainage", in Spanish) is the outlet of Lake Nicaragua (also known by its native name of Lake Cocibolca). It flows out of the southeastern end of Lake Nicaragua, next to the city of San Carlos, and empties into the Caribbean Sea along the shores of the municipality of San Juan de Nicaragua.[14] (See Sketch Map 1)

1.1.3 The San Juan River is a natural channel that drains the waters of the Great Lake into the Caribbean Sea, following a rectilinear and winding course, 205 kilometers long, and descending 31 meters from the level of the lake into the sea. The river jumps over a series of rapids interposed in its median course, amongst which the rapids of Toro, Castillo, San Pablo, Balas, Diamante, Machuca and Campana can be appreciated. Its main affluents originating entirely in Nicaraguan territory are the rivers Malacatoya, Oyate, Mayales, Acoyapa, Tepenaguazapa, Tule, Camastro, Ochomogo and Sábalos; and the rivers San Carlos, Sarapiquí, Frío, Medio

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[14] Sketch Map 5 of the Costa Rican *Memorial* does not reflect the correct attribution of territory of Nicaragua and Costa Rica at the general area of the mouth of the San Juan River. Nicaragua therefore reserves her rights generally on these questions.

Queso, Palo de Arco, Negro and Pocosol that partially originate in Costa Rica's territory.

1.1.4 The San Juan is not a border river but an integral and indivisible part of the Republic of Nicaragua and thus runs along its whole course within Nicaraguan territory, in the department of the same name, which is located in the country's southeast region. The border between Costa Rica and Nicaragua runs along the right bank of the lower course of the River from Punta de Castilla, at its mouth, to a point upstream three English miles below Castillo Viejo. From that point until its origin in Lake Nicaragua, the right bank of the River ceases to mark the border and the San Juan runs entirely inside the Nicaraguan territory.[15]

1.1.5 The volume of water of the river is remarkable. Its drainage area[16] is approximately 40,660 square kilometers. The water flow varies in time and space along the 205 kilometers of the river. According to measurements made by the United States Corps of Engineers[17] between 1930 and 1950, the flow of the river immediately downstream from the mouth of the Sarapiquí River was 1,100 cubic meters per second during the indicated period. In the measurements made by the National Power and Light Company (ENALUF)[18] at the rapids of El Castillo between 1971 and 1973, the average flow was 516.9 cubic meters per second.

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[15] See Sketch Map 1 and CRM Vol. 2, Annex. 7, Article II of the Treaty of 1858, at pp. 54-60.

[16] San Juan River Hydroelectric and Navigation Project, Volume 1, p. 43. The Governments of Nicaragua and Costa Rica. December 1977.

[17] *Ibid*, p. 47.

[18] Hydrometric database of the Nicaraguan Institute for Territorial Studies (INETER).

1.1.6 This volume of water not only originates from the lake and its tributaries, but also from the waters of its affluents. The water volume is reinforced by the region's heavy rainfall that ranges from 2,000 to 6,000 millimetres annually, one of the highest figures registered in the American continent.

1.1.7 In the second half of the 19th century, part of the river waters was diverted to Costa Rican territory, flowing out into the Colorado River. This process of diversion of water has also occurred in the affluents of the San Juan originating in Costa Rican territory where the waters are diverted indiscriminately for agricultural and industrial purposes.

1.1.8 The sediment load that the San Juan River receives from rivers originating in Costa Rica is very heavy. Thus, the sediment load immediately downstream from the Sarapiquí River, measured at the beginning of the seventies, was 10.2 million metric tons per year[19].

1.1.9 The result of all this has been that the bay of San Juan de Nicaragua has undergone sedimentation and obstruction over time, in such way that now the bay communicates with the sea through a narrow outlet.

1.1.10 These affluents of the San Juan originating in Costa Rica have also carried substantial amounts of pollutants that have damaged the San Juan de Nicaragua River.

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[19] According to the calculations made by the Central American Hydrological Project (PHCA), with the assistance of the United Nations Development Programme, San Juan River Hydroelectric and Navigation Project, Volume 1, page 69. The Governments of Nicaragua and Costa Rica. December 1977.

1.1.11 The geomorphology of the San Juan valley is defined by certain structural elements located on each side of the old continental dividing line that was part of the Central Mountain Shield, which declines and ends in front of the median course of the river.

1.1.12 In its first segment, comprised from its outlet in the lake to El Castillo, the river course flows broadly, with an average width of 300 meters; its banks are low and prone to flooding, the main affluents in this sector being the Frío, Melchora, Medio Queso, Pocosol, Sábalos and Santa Cruz rivers. Sandy islands covered with vegetation are located in the median of the elongated current. The tree vegetation that originally covered the banks of the river in this sector has been significantly altered and replaced by grazing land.

1.1.13 In its median course, the river descends through a series of interposed rapids, where rocks protrude to the surface making navigation difficult. These rapids constitute the projection of the Central Shield, at the south extreme, made up of old volcanic and sedimentary rocks. In this sector, the river narrows, passing through necks not more than 50 meters wide; the current becomes deeper and forms ponds, creating the so-called "dead waters". The Bartola, Infiernillo and Las Cruces affluents have a short course. Beyond the Bartola River, the great Indio-Maíz Biosphere Reserve (2,639.8 km²)[20] begins, extending downstream, adjacent to the Nicaraguan bank, and ending in the Caribbean Sea.

1.1.14 After passing the confluence of the San Carlos River, which descends from the volcanic chain of Costa Rica, the river recovers its original width;

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[20] Decree 66-99. "Update and Definition of categories and limits of Protected Areas located in Nicaragua's southeast territory". 31 May 1999. NCM, Annex 61.

the elongated isles reappear and the current forms rectilinear shoals followed by closed curves in the alluvial and marshy plains of the Caribbean Sea, up to the confluence of the Sarapiquí, another river originating in Costa Rica.

1.1.15 When it reaches the delta, the current begins to bifurcate in the middle of a very flat and sedimentary terrain, where the banks of the different river tributaries are very low, connecting in some parts with marshy areas, and leaving behind small enclosed lagoons (Sílico, Ebo, La Barca, Harbor Head), which not too long ago formed part of the main course of the river. Sedimentation is predominant in this sector, which is further exacerbated by the sands dragged by the San Carlos and Sarapiquí rivers from Costa Rican volcanoes. This sedimentation from rivers originating in Costa Rica is responsible for almost blocking the Nicaraguan outlet into the sea of the San Juan de Nicaragua River during the last hundred years, and for diverting the largest volume of water into the Colorado River, the other outlet of the San Juan located in Costa Rica. In effect, during the driest months of the summer, the Nicaraguan outlet of the San Juan de Nicaragua River does not even reach half a meter in depth, which hinders navigation by even small-draft boats.

1.1.16 The vegetation around the delta is predominantly marshy and emergent, dotted with palms, while the formation of mangroves is scarce and limited to certain areas in the bay of San Juan de Nicaragua.

1.1.17 At present, the bay of San Juan del Norte is about three kilometres long. It is highly sedimented and is partially covered by floating invasive

vegetation (Eichornia). This process has accelerated since the main current of the river was diverted to the Colorado on or about 1860.

RESERVES

1.1.18 The lower part of the San Juan de Nicaragua River, the natural conditions of the territory, its climate and topography, have allowed for the existence of important ecosystems and natural areas that have facilitated the structuring of a National System of Protected Areas, that constitutes a form of organization that commands special attention.

1.1.19 It includes the Southeast Biosphere Reserve of Nicaragua, recognized by the Man and Biosphere Programme, coordinated by the United Nations Educational, Scientific and Cultural Organization (UNESCO) since 2003, as part of the world-wide network under the name "San Juan de Nicaragua Biosphere Reserve".

1.1.20 Likewise, Nicaragua's southeast region is one of the main links of the Mesoamerican Biological Corridor and constitutes one of Nicaragua's principal contributions to the Corridor.

1.1.21 The southeast region, with an estimated area of 18,341 square kilometers, includes the department of Río San Juan and part of the South Atlantic Autonomous Region (RAAS).

1.1.22 On 17 April 1990, the Government of Nicaragua created the Southeast Natural Protected Areas of Nicaragua, through Presidential Decree 527,

published in Official Gazette N° 78 of 23 April 1990[21]. This decree creates the Solentiname Archipelago National Monument, the "Los Guatuzos" Wildlife Refuge, the "Fortaleza de la Inmaculada Concepción de María" Historical Monument and the Great Indio-Maiz Biological Reserve, as well as the National Commission for Management and Development of Nicaragua's Southeast Natural Protected Areas.

1.1.23 On 8 June 1994, Decree 28-94 was published in Official Gazette N° 106, declaring Nicaragua's southeast region a Sustainable Development Territory. The objective of the declaration is to foster "rational use of natural resources, environmental conservation, biodiversity and development, based on the capacity of use of the land and, in particular, ecotourism"[22]. The limits of the Indio-Maíz Biological Reserve were extended by this decree.

1.1.24 On 31 May 1999, the Government of the Republic of Nicaragua, through Decree number 66-99, "Update and Definition of Categories and Limits of Protected Areas located in Nicaragua's southeast territory", declared the Southeast Protected Areas System as the "Southeast Biosphere Reserve of Nicaragua", initiating a new phase in the management of natural areas in the region comprised by the following protected areas:

(See Sketch Map 2)

"Los Guatuzos" Wildlife Refuge
Solentiname Archipelago National Monument
"Fortaleza de la Inmaculada Concepción de María" Historical Monument
Cerro Silva Natural Reserve

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[21] See NCM, Annex 59.
[22] See NCM, Annex 60.

Indio-Maíz Biological Reserve
Punta Gorda Natural Reserve
San Juan River Wildlife Refuge"[23].

1.1.25 The reserves, which enjoy a special protection regime, occupy a large portion of the territory adjacent to the lower course of the river, thus population in the adjacent zones is scarce, dispersed and fragmented in small houses, farms and villages.

Section 1.2

The Treaty of Limits of 1858: Historical Background

1.2.1 The borders between Nicaragua and Costa Rica were established during the Colonial Period when the present day Central American States were part of the Captaincy General of Guatemala, an administrative and political dependency of the Spanish Empire. When the Central American States gained their independence from Spain in 1821 they accepted that their borders would be ruled by the principle of *uti possidetis iuris*. The adoption of this legal imperative sought to avoid territorial disputes that might provoke border wars between the new States.

1.2.2 Although in this early period the borders were not exactly demarcated, the two territorial questions that plagued the relations of Nicaragua after independence were quite clearly established. One was that on the Pacific Ocean or western side of the border was located the District of Nicoya (also referred to in Spanish Colonial terms as the "Partido de Nicoya") that was part of Nicaragua and extended to the river El Salto. On the Atlantic or eastern side the border was the mouth of the San Juan River that "belonged to Nicaragua"[24].

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[23] See NCM, Annex 61.

1.2.3 These colonial borders clearly established that on the Pacific or western side of the Central American Isthmus, the Nicaraguan borders went from the Gulf of Fonseca to the North down to the Gulf of Nicoya on the South, whilst on the Atlantic the San Juan River was entirely Nicaraguan.

1.2.4 Shortly after independence, a civil War broke out in Nicaragua in 1824 that deeply divided the country and weakened its capacity for defending her territory. During this turmoil, and turning her back on the principle of *uti possidetis iuris*, Costa Rica annexed the large District of Nicoya and with this territory in hand, began her crusade for getting a part of what was considered the most important territorial treasure of the area: the extensive Lake Nicaragua and its outlet to the sea, the San Juan River, that was considered the most important and feasible canal route for uniting the Pacific and Atlantic Oceans.

1.2.5 The territorial dispute prompted by this situation continued until the 1850s when Nicaragua was invaded and taken over by military elements proceeding from the United States. It was clearly perceived by Nicaragua's neighbours that the ultimate aim of this invasion was to take over Central America. This prompted a crusade involving all Central America in order to defeat these foreign forces. Prominent among these Central American forces that came to assist Nicaragua was a Costa Rican army.

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[24] Royal Charter of 1573, NCM, Annex 86.

1.2.6 After the invaders were expelled from Nicaragua and the danger to Central America was over, Nicaragua signed a Treaty with Costa Rica in 1858 that aimed to settle the territorial dispute that had rankled their relations since the annexation of the District of Nicoya by Costa Rica in 1824. By means of this Treaty Nicaragua accepted the Annexation of Nicoya by Costa Rica; Costa Rica for her part recognized that Nicaragua was the entire and sole sovereign of the San Juan River and that her border with Nicaragua did not reach as far as the coast of Lake Nicaragua. In this Treaty Nicaragua also granted limited rights of navigation to Costa Rica in a part of the San Juan River. The extent of these rights of navigation of Costa Rica is the issue presently before the Court.

1.2.7 This section provides an overview of the legal history of the issues related to the limited rights of navigation that were granted to Costa Rica in the San Juan de Nicaragua River.

A. THE SAN JUAN RIVER UNDER SPANISH RULE (1527-1821)

1.2.8 Costa Rica asserts in her *Memorial* that "During the period of Spanish colonial rule the San Juan never belonged exclusively to any one of the provinces of the Captaincy-General of Guatemala."[25]

1.2.9 Not content with the previous misstatement of the facts, Costa Rica claims that at the time of independence from the Kingdom of Spain, both banks of the middle course corresponding to the lower course of the San Juan de Nicaragua River were part of the Province of Costa Rica, whilst Nicaragua's sovereignty was limited to the first fifteen leagues starting from the mouth of the river at the Lake Nicaragua. She bases her allegations on a Royal Ordinance of 29 November 1540 to Diego Gutierrez[26].

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[25] CRM, para. 2.0, p. 9.

1.2.10 It is true that there was a Royal Charter given by Emperor Charles V to Diego Gutierrez, on 29 November 1540 for the conquest and settlement of the Province of Veragua, from that time onwards known as the Province of Cartago, or Costa Rica.[27] However, the 1540 Royal Charter was repealed and substituted by a new Royal Charter given by Emperor Philip II to Diego de Artieda on 1 December 1573. Article 12 of this document states:

> "Firstly, we give you license and authority to discover, settle and pacify the aforesaid Province of Costa Rica and other lands and provinces contained therein, from the North Sea to the South Sea in latitude and in longitude from the border of Nicaragua in the Province of Nicoya, straight to the valleys of Chiriquí, up to the Province of Veragua, on the southern part, *and on the northern part, from the mouths of the Desaguadero, that belong to Nicaragua, all across the land, to the Province of Veragua.*"[28] (Emphasis and explanation added)

1.2.11 The above quoted Royal Charter granted to Diego de Artieda in 1573, set the definitive territorial bases for the common border between Nicaragua and Costa Rica until their independence from Spain in 1821. It established very clearly that "the mouth of the Desaguadero (San Juan River)...belongs to Nicaragua..."[29].

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[26] Royal Charter given to Diego Gutiérrez, 29 November 1540; CRM, Vol. 2, Annex 1.

[27] Mr. Manuel M. De Peralta: Extraordinary Envoy and Minister Plenipotentiary of Costa Rica during the pleadings prepared for the arbitral process by the Spanish crown in 1891, in her territorial dispute against the Republic of Colombia, relates that this charter was challenged by the Province of Nicaragua: "*...Rodrigo de Contreras, governor of Nicaragua protested... and filed a claim against Diego Gutierrez for the part over which he believed he had right in the Desaguadero. The Council of the Indias... ruled on March 16, 1541....Contreras appealed this sentence and the Council amended it on April 9th next... depriving of the navigation and fishing enjoyment in common with the governor of Nicaragua...*" "Historia de la Jurisdicción territorial de la República de Costa Rica", Peralta, Manuel, p. 38 para. 55. NCM, Annex 77.

[28] Royal Charter given to Diego de Artieda, 1 December 1573. NCM, Annex 86.

1.2.12 Finally, Costa Rica's claim that during all the colonial period and until the moment of independence of both Republics (1821), the San Juan de Nicaragua River was a water course shared by both colonial provinces lacks historical documentary support. Apart from this, the geography of the area belies this assertion. Whilst there were no roads from the Costa Rican settlements to the San Juan River, the Province of Nicaragua enjoyed safe and speedy communication with the San Juan de Nicaragua River from all its major population areas, through Lake Nicaragua.

B. THE POST-INDEPENDENCE AND FEDERAL PERIOD (1821-1838)

1.2.13 Shortly after independence, when Nicaragua's internal rivalries heated up to cause the first Civil War (1824), the Government of Costa Rica exerted pressure on the authorities and the population of the Nicaraguan District of Nicoya in order to annex it to its jurisdiction. The pressure resulted in a declaration by authorities of the District of Nicoya of annexation to Costa Rica (1824).

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[29] According to Spanish Colonial law, applicable in 1821, the Costa Rican Territory was: "... from the North Sea [Caribbean Sea] to the South Sea [Pacific Ocean], in latitude and in longitude from the border of Nicaragua in the Province of Nicoya, straight to the valleys of Chiriquí, up to the Province of Veragua, on the southern part, *and on the northern part, from the mouths of the Desaguadero, that belong to Nicaragua, all across the land, to the Province of Veragua....*" (Royal Charter of 1573- Article 12); NCM, Annex 86. Also the Academia Costarricense de la Historia has stated that: "...it would not be until 1573, with the Royal Charter granted to Artieda y Chirinos, that a significant change occurred with respect to the limits. This latter date would also fix the limits that would reign during the entire colonial regime." Academia Costarricense de la Historia: *IV Centenario de la entrada de Cavallón a Costa Rica. 1561-1961.* San José, Imprenta Nacional, 1961, pp. 45.

1.2.14 As things stood, the Federal Congress issued a Decree on 9 December 1825, which provided in Article 1: "For the time being, and until the demarcation of the territory of the States is carried out as prescribed in Art. 7 of the Constitution, the Party of Nicoya will continue separated from the State of Nicaragua and annexed to that of Costa Rica."[30] The words *"for the time being"* and *"until the demarcation"* reflected the transitory situation of the territory of Nicoya, claimed by Nicaragua as legitimate owner.

1.2.15 Costa Rica continued to recognize the colonial borders in her first Constitution of 1825 where she defines her territory under Article 15, the following way: "The State's territory will extend, for now, from West to East, from El Salto River, which divides it from that of Nicaragua, up to the Chiriquí River, which is the border of the Republic of Colombia, and from North to South, from one sea to the other, being its limits on the north the mouth of the San Juan River and the shield of Veraguas, and in the south the mouth of the Alvarado River and that of the Chiriquí"[31] (See Sketch Map 3). It is important to point out the coincidence between the language of the Royal Charter of 1573 and the Costa Rican Constitution of 1825. The River, El Salto (within the confines of the Nicaraguan District of Nicoya) and the mouths of the San Juan River composed the westernmost and easternmost points that separated the territories of the Provinces of Costa Rica and Nicaragua since the colonial period. These points made up the southern boundaries of the Nicaraguan District of Nicoya. This was another, explicit recognition that the District of Nicoya and the San Juan River both belonged to Nicaragua during the Colonial Period (See Sketch Map 4).

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[30] NCM Annex 55.

[31] CRM, Vol. 6, Annex 193, p. 769.

The 1825 Federal Congress of Central America's decree was not only emporary, it was not ratified by the respective State Congresses as prescribed in the Fundamental Charter of Central America. On her part, Nicaragua vigorously and consistently claimed her rights over these erritories before the Federal Congress.

n 1838, at the time of the dissolution of the Central American Federation, he Federal Authorities had not undertaken any action to solve the matter of the temporary annexation of the District of Nicoya to Costa Rica. Costa Rica's unilateral decision not to return the territory temporarily annexed to t by the Federal Congress was thereon, the cause of constant friction with Nicaragua.

As will be seen below, this dispute would affect the bilateral relations until their definitive settlement under the Treaty of Limits of 1858. Before his Treaty was signed, Nicaragua had not accepted Costa Rica's annexation of Nicoya (Guanacaste) as definitive and irrevocable.

C. THE POST-FEDERAL PERIOD (1838-1848)

Disregarding the accepted principle of *uti possidetis iuris*, and setting side the territorial borders previously established in her own 1825 Constitution, Costa Rica staked out new territorial claims for the first time, by granting constitutional rank to her thesis of "natural limits" in her "Decree of Bases and Guarantees" of 1841[32], according to which her northern border began at the mouth of the La Flor River (on the Pacific),

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Vol. 6, Annex 194.

continuing along the southern bank of Lake Nicaragua and the San Juan River, down to the mouth of the latter on the Atlantic Ocean. That is, by her own Decree Costa Rica made herself a riparian of the coveted Lake Nicaragua and her outlet to the Atlantic, the San Juan River. Undoubtedly, this decision "constituted a unilateral act that logically did not obligate our northern neighbour [Nicaragua]"[33], as confirmed by a Costa Rican historian.

1.2.20 In an apparent attempt to conceal the weakness of her historical claims, Costa Rica portrays the borders fixed in the 1825 Constitution as being the equivalent of those appearing in her 1841 Constitution. In effect, Costa Rica affirms in her *Memorial*:

> "The fundamental Law of the State of Costa Rica of 25 January 1825, Article XV, reasserted the limits of Costa Rica, establishing that the territory reached both seas and extended from south to north, being her limits on the north, the mouth of the San Juan River and the shield of Veragua. Likewise, the Decree of Basis and Guarantees of 1841, established the limits of the national territory of Costa Rica, declaring the limit of the national territory in the following terms:
>
> > "On the west, the La Flor River and continuing along the shore of the Lake of Nicaragua and the San Juan River, down to the mouth of the latter on the Atlantic Ocean; on the north, the same ocean from the mouth of the San Juan River to the Shield of Veragua."[34]

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[33] Sáenz Carbonell, Jorge Francisco, "Historia diplomática de Costa Rica (1821-1910)". San José, C. R., Editorial Juricentro, 1996, p. 70.

[34] CRM, para. 2.13.

1.2.21 In other words, Costa Rica attempts to portray both constitutional texts as concurring in their description of the borders with the State of Nicaragua. Such and attempts flies against the clear wording of the legal texts. Thus, Costa Rica conveniently leaves out the complete text of Article XV of her first Political Constitution of 1825, which provides as follows: "The State's territory will extend, for now, from West to East, from the Salto River, which divides it from that of Nicaragua,..."[35].

1.2.22 Furthermore, as regards the border with Nicaragua, both Constitutional texts do not concur. The 1825 Constitution recognizes the colonial principle of *uti possidetis iuris*, based on the 1573 Royal Charter, which established that the division between both provinces was located "from the border of Nicaragua in the Province of Nicoya," (in the South Sea) and, "*...from the mouths of the Desaguadero, that belong to Nicaragua...*" (in the North Sea), while the 1841 Constitution unilaterally modified the colonial borders in violation of the *uti possidetis iuris* principle that had been accepted by both countries at independence.

1.2.23 To summarize, Costa Rica is incorrect when she states that the principle of *uti possidetis iuris* was determined by the Royal Charter granted to Diego Gutierrez in 1540[36]. Costa Rica is also mistaken when it points out to the Court that the San Juan River did not belong exclusively to the territorial district of the province of Nicaragua during the colonial period[37]; and now it is being inaccurate again when she states that her first and second Political Constitutions concurred with respect to the definition of *uti*

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[35] CRM, Vol. 6, Annex 193, p. 769.
[36] CRM paras. 2.08 and 2.10.
[37] CRM para. 2.08.

possidetis iuris[38], thus suggesting that since 1540 Costa Rica was a riparian of the San Juan River.

D. PERIOD OF INTERNATIONALIZATION OF THE DISPUTE

1.2.24 The possibility of cutting a canal across the Central American isthmus was recognized early on by the Spanish conquistadores. The two routes that were considered ran one through Nicaragua and the other through Panama. The Nicaraguan route from the Atlantic would run up the San Juan River, cross Lake Nicaragua, and be completed by a channel dug through the narrow isthmus of Rivas on the Pacific.

1.2.25 After independence from Spain, when the key to the canal route through the San Juan river and lake Nicaragua rested on even weaker hands than that of the waning Spanish Empire, other stronger contestants for this route came more openly into play.

1.2.26 The most difficult international problems that Nicaragua has faced have usually been related to this potential as a canal route. A keen observer, the Minister of the United States in Nicaragua in 1913, Mr. George Weitzel, considered that these Nicaraguan problems had their origin in the possibility of the canal route: "In all the cases of controversies of Nicaragua with Europe, Mexico and Colombia, the true cause of the problem was desire to control the route of the interoceanic channel."[39] In this enumeration of interested outsiders Minister Weitzel did not mention

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[38] CRM para. 2.13.

[39] American Policy in Nicaragua. Memorandum on the Convention Between the US and Nicaragua relative to an Interoceanic Canal and a Naval Station in the Gulf of Fonseca, signed at Managua, Nic. on 8 February 1913. By George T. Weitzel, Former American Minister to Nicaragua, 1912-1913. Washington, Government Printing Office, 1916, p. 7.

William Walker[40] and others of his compatriots that had also shown extreme interest in the Nicaraguan canal route that at one time was even referred to as the "filibuster freeway"[41]

1.2.27 The fatal attraction of this canal route has also tainted the relations of Nicaragua with her neighbours. Costa Rica in particular always viewed with longing the advantages of Lake Nicaragua and the San Juan River. It has been a temptation so near and yet so far...

1. First stage: the threat of England and her alliance with Costa Rica

1.2.28 After the withdrawal of Spain, Great Britain decided to "resurrect," her old protectorate over the Miskito Indians that lived in the Caribbean Coast of Nicaragua. Great Britain had renounced her claims to this "protectorate" by virtue of the Treaties of Peace celebrated with Spain in 1783 and 1786. But this time Great Britain went beyond her previous claims. She extended the geographical area of the protectorate further to the south, in such a way as to include the mouth of the San Juan River and the Nicaraguan port of San Juan del Norte located in the estuary. Thus, on 1 January 1848 combined British and Mosquito (Miskito Indians) forces disembarked at the port of San Juan de Nicaragua, lowered Nicaragua's flag, and appointed authorities on behalf of the Mosquito King.

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[40] "Walker became president of Nicaragua on July 12, 1856, and maintained himself against a coalition of Central American states until May 1, 1857. In order to avoid capture, he surrendered to the United States Navy and returned to the United States." "Walker, William." *Encyclopædia Britannica. 2007*. Encyclopædia Britannica 2006 Ultimate Reference Suite DVD 28 Apr. 2007.

[41] Bermann, Karl: "Under the Big Stick: Nicaragua and the United States Since 1848" (South End Press, Boston 1986), p. 91. The United States citizens who invaded Nicaragua in the 1850s were referred to as "filibusteros" (filibusters). Their leader was William Walker.

1.2.29 Costa Rica saw an opportunity to obtain British recognition for her territorial claim on the southern bank of the San Juan River as well as to obtain a right of navigation on the river for her wares under advantageous conditions. Therefore, Costa Rica approved the British use of force, proclaimed her recognition of British claims and in return obtained British support for her own claims. This diplomatic action, in contravention of her previous official position was repudiated by the rest of Central American Governments who felt equally threatened in their own territories by these British claims and actions.[42]

1.2.30 Costa Rica's backing of Great Britain's reinstating and expansion of the Protectorate it had imposed on the Mosquito Indians, further internationalized the dispute. Thus, faced with this threat, Nicaragua sought to enter into an alliance with the United States of America.

2. Second stage: *The transit route and the concession contracts granted by Nicaragua to U.S. concessionaires*

1.2.31 The interest of Great Britain on the transit and canal route through Lake Nicaragua and the San Juan River found her counterpart in that of the United States of America. The discovery of gold in California in 1848 spurred a multitude of travellers to that territory and transit through the Central American isthmus became of strategic interest to the United States. The main routes followed were through Nicaragua and Panama.

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[42] Costa Rican historian Clotilde Obregón recognizes her country's less than candid strategy in these terms: "*Costa Rica accepted the limits given by the English, even though years earlier it had stated that the Mosquito territory did not extend to the San Juan [...] Christie [...] stated that [Costa Rica] had a right of free navigation from the confluence of the Sarapiqui [with the San Juan] up to the outlet [...] The fact that Costa Rica was dealing with a British consular representative, accredited before the Mosquito King, was a terrible tactic, even during those moments of crisis ...*" Obregon, Clotilde. "El río San Juan en la lucha de las potencias (1821-1860)". San José, C. R., Editorial Universidad Nacional a Distancia, 1993, pp. 93-94.

The Nicaraguan route, located further to the North than Panama, was shorter by several hundred miles and even cheaper for those sailing from the east coast of the United States to California. Consequently, the U.S. government, in view of the British attempts to control any feasible canal route through Nicaragua, countered by promoting a canal built by a U.S., private company.[43]

1.2.32 Three companies -two U.S. and one British enterprise- were openly competing for a canal contract in 1849. The contract was finally awarded to the American Atlantic and Pacific Ship-Canal Company, established in New York by a group of investors headed by Cornelius Vanderbilt. The contract was concluded and signed on 27 August 1849. A short review of these concessions may be appreciated below in the following section[44].

3. The Anglo-American Treaty: Clayton-Bulwer of 1850

1.2.33 The possibility of a transatlantic canal in Nicaragua under control of the United Sates, increased diplomatic tensions between this Government and Great Britain. In order to avoid a major confrontation both countries entered into the so called Clayton-Bulwer Treaty, on 18 April 1850. According to its preamble, the object of the treaty was to set forth and fix their views and intentions "with reference to any means of communication by Ship Canal, which may be constructed between the Atlantic and Pacific Oceans, by way of the river San Juan de Nicaragua and wither or both of

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[43] Rosengarten, Frederic Jr.; "Freebooters must die!" Haverford House, Publishers, Wayne Pennsylvania, p. 59.
[44] NCM, paras. 1.3.10-1.3.18.

the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean."[45]

1.2.34 Article I of the Clayton-Bulwer Treaty further asserted that neither Party would ever "obtain or maintain for itself any exclusive control over the said Ship Canal", and that neither Party would "erect or maintain any fortification commanding the same"[46].

E. PERIOD OF THE NATIONAL ANTI-FILIBUSTER WAR (1855-57)

1.2.35 In 1855, as a consequence of Nicaragua's Civil War between the legitimist (conservative) party and the democratic (liberal) party, American soldiers of fortune known as filibusterers (filibusteros) started arriving in Nicaragua. In the course of the hostilities, the United States' based Accessory Transit Company, at the time facing pending claims for fiscal payment from the Nicaraguan Government, initially entered into collusion with the leader of the filibusterers, William Walker. The Company offered its steamers to transport Walker's mercenaries at no cost. Later on, Walker displaced the parties at war and proclaimed himself President of Nicaragua, not without first convincing the coalition government, which he already controlled, to revoke the 1849 contract granted to the U.S. Accessory Transit Company.[47]

1.2.36 Costa Rica declared war on Walker, stating (in the Presidential Proclamation) that it was not driven by any desire to conquer territories, but simply wanted to aid Nicaragua against the Walker invasion. The

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[45] Clayton-Bulwer Treaty. CRM, Vol. 2, Annex 4.

[46] *Ibid.*

[47] NCM, Annex 56. Decree revoking the rights and privileges granted to the American Atlantic and Pacific Ship Canal Company and Accessory Transit Company, 18 February 1856.

Governments of Guatemala, El Salvador and Honduras also declared war on Walker.

1.2.37 Betrayed by Walker, U.S., financier Cornelius Vanderbilt also orchestrated a military and financial plan to defeat him and the other usurpers of his interests in the accessory Transit Company. To those ends, Vanderbilt provided advice and finance to the Costa Rican expedition that would take over the transit route and the Company's steamers. With the loss of the transit route the filibusterers were isolated and were not able to receive reinforcements and materiel to resist the attacks of the combined Central American forces. In May 1857 Walker capitulated and abandoned Nicaraguan territory.

1.2.38 The end of the bloody war, and Costa Rica's support during the struggle created a positive climate in Nicaragua to subscribe with Costa Rica the 1857 Treaty of Limits, known as the Juárez - Cañas Treaty (not to be confused with the definitive 1858 Treaty of Limits, known as the Jerez - Cañas Treaty), that sought to put an end to the territorial and boundary dispute.

1.2.39 The 1857 Juarez-Cañas Treaty of Limits was not ratified by Costa Rica for reasons explained below; however the stipulations of the Treaty are of the utmost importance, since it is one of the closest precedents to the 1858 Jerez-Cañas Treaty of Limits. Its main objective was the solution of the intractable question of sovereignty over the Province of Nicoya. The first article of this Treaty was addressed to this purpose:

> "First: The Government of Nicaragua, as a sign of special gratitude to the Government of Costa Rica for the solid

> determination and great sacrifices made for the cause of national independence, waives, takes and put away every right on the District of Guanacaste, which is now called the Province of Moracia of the Republic of Costa Rica, to be understood, held, and acknowledged, from now and forever, as an integral part of said Republic, under the *sovereign jurisdiction of said Government*...." (Emphasis added)[48]

1.2.40 This Treaty was signed soon after the end of the first war against Walker at a moment when Costa Rica had retained military control of the San Juan and the transit route through Nicaragua. Nonetheless, it is important to point out that the Republic of Nicaragua when renouncing its claim to the District of Nicoya (also called Guanacaste or Moracia, at different times), took painstaking care to safeguard its sovereignty over the San Juan de Nicaragua River. Thus, in tune with its obligations and economic interests it had the precaution to establish clearly the nature of Costa Rica's rights of navigation, which was to be limited to "*articles of trade*", either for international, bilateral or local trade. This was a reaffirmation that Costa Rica accepted to be excluded perpetually, from the right to transport passengers.[49]

1.2.41 In the end, this 1857 Treaty of Limits was not ratified by Costa Rica. The reason for this was that after the withdrawal of Walker, Costa Rica seeing herself in control of the transit route and of the steamers destined for her business exploitation, decided to transform her anti-filibusterer campaign into a war of territorial conquest. In an attempt to implement her territorial “conquests”, Costa Rica signed a Concession with William Webster (14 July 1857)[50] ceding rights for the business exploitation of the transit route that passed entirely through Nicaraguan territory.[51]

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[48] Juárez – Cañas Treaty, 6 July 1857; CRM Vol. 2, Annex 5.

[49] About this Treaty, Costa Rican historian Sáenz Carbonell comments: "In general terms, and considering that at that time the region of Rio San Juan was under Costa Rican military control, the agreement was relatively balanced because Nicaragua renounced its claims over Moracia (Guanacaste) and *Costa Rica renounced its claims over the waters of the San Juan and the Southern shores of Lake Nicaragua;* besides, Nicaragua received the zone between the La Flor River and the bay of Salinas, which was considered important for the inter-oceanic transit." (Emphasis added). Sáenz Carbonell, Jorge Francisco, "Historia diplomática de Costa Rica (1821-1910)". San José, C. R., Editorial Juricentro, 1996, p. 236.

1.2.42 This intention of territorial conquest by Costa Rican Government can be appreciated in the diplomatic note sent, on 30 July 1857, by Lewis Cass, Secretary of State of the United States, to William Carey Jones, Special Agent of the United States to Central America: “SIR: Reports have reached here…that the Government of Costa Rica … intends to appropriate to itself portions of the Territory of Nicaragua, thus converting the war which has just been terminated by the accomplishment of the object for which it was avowedly undertaken into a scheme for territorial acquisition. Such a design is so unjust in itself, in view of the circumstances…she would violate the solemn pledges given when she proposed to go to the aid of Nicaragua by attempting to convert this into a war of conquest.”[52]

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[50] Webster - Harris - Escalante Contract, 14 July 1857; NCM, Annex 16.

[51] About this contract, Sáenz Carbonell stated: “Through the Escalante-Webster, Costa Rica granted to the Britton (Webster) and Harris exclusive rights over the Transit route, through the San Juan, the Lake Nicaragua and the Sapoá River. As consideration Webster and Harris agreed to lend Costa Rica 500,000 pesos and part of the revenues from the exploitation of the transit route... Our country would try to get Nicaragua *to grant those* exclusive rights over the Transit route to Costa Rica *or to approve the terms of the contract*. In this contract, the Escalante-Webster, Costa Rica again granted concessions over Nicaraguan territory *that had never been claimed before*. This time it granted rights of transit over La Virgen and San Juan del sur and the land in those localities.” (emphasis added); Sáenz Carbonell, Jorge Francisco, “Historia diplomática de Costa Rica (1821-1910)”. San José, C. R., Editorial Juricentro, 1996, p 240.

[52] Note Lewis Cass, Secretary of State of the Unites States, to William Carey Jones, Special Agent of the United States to Central America. Washington, 30 July 1857. Diplomatic Correspondence of the United States. Interamerican Affairs 1831-1860. William R. Manning Volumen IV. Central América 1851-1860. p. 95. NCM, Annex 37.

1.2.43 In her efforts to take by force the transit route and pressure Nicaragua into accepting the concession granted to Webster, on 14 October 1857 Costa Rica gave an ultimatum to the Government of Nicaragua to hand over the lakeside port of San Carlos[53], located at the mouth of Lake Nicaragua into the San Juan River. This ultimatum was considered by President Tomás Martínez as a declaration of war and the Nicaraguan Government responded with a decree dated 19 October 1857, that stated the following:

> "Art. 1. Nicaragua accepts the war declared by the Government of Costa Rica and will vindicate its rights which have been deliberately violated by the conduct of that Government.
>
> Art.2. The Republic of Nicaragua will protect and preserve its rights along the entire transit route, from San Juan del Norte, through the river and lake, to San Juan del Sur, as well as the rights it has in the district of Guanacaste, including its lands, forests and rivers.
>
> Art.3. The necessary force will be organized to execute the provisions of this decree."[54]

1.2.44 The situation worried the United States that saw her interests threatened. Thus, in a note sent to the Minister of Foreign Affairs of Nicaragua, D. Gregorio Juárez, on 17 October 1857, by the US special envoy to the Republics of Nicaragua and Costa Rica, the position of his Government was expressed in these terms: "…It is the opinion of the government of the United States that the government of Costa Rica in inaugurating the war of which Nicaragua was lately the scene, precluded herself by her public declarations from any territorial acquisition or advantages in the result of it; and that therefore if the two States still differ as to a divisory line, the position in which they were anterior to the war ought to be restored, both in respect of fact and law, that is, leaving the Republic of Nicaragua in the exclusive jurisdiction of the transit. It is further the opinion of the United States that the route by way of the river San Juan and Lake Nicaragua ought to be under a sole jurisdiction, and that that jurisdiction ought to remain with the State which, in full possession of it, heretofore granted the use of it."[55]

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[53] Note from Coronel Jorge Cauty to Coronel Segundo Cuarezma, Commander of the San Carlos Fort. San Carlos, 14 October 1857; NCM, Annex 22.

[54] Decree No. 139 through which Nicaragua accepted the war declared by Costa Rica. Managua, 19 October 1857. Published at the Official Gazette of the Republic of Guatemala, Monday 16 November 1857. Exterior. Nicaragua, NCM, Annex 57.

1.2.45 The strongest regional and international opposition to Costa Rica's attitude notwithstanding[56], she did not refrain from attempting to seize to her advantage the favourable circumstances in order to impose upon Nicaragua "her" territorial and boundary ambitions. Nicaragua was prostrated economically and militarily after years of civil war that had decimated her population and razed her productive infrastructure. Aside from the Costa Rican military occupation, Nicaragua had to face a new invasion by the Walker-led filibusterers, which in November 1857 had disembarked on the port of San Juan de Nicaragua in an attempt to retake control of the country.

1.2.46 The news of the arrival of the filibusterers had the effect of prompting the withdrawal of the Costa Rican occupation forces in the San Juan de Nicaragua River, but not before forcing Nicaragua under these dire circumstances to sign a detrimental Treaty of peace with Costa Rica on 8 December 1857 known as the Martínez - Cañas[57]. Fortunately, the filibusterers were quickly captured and taken to the United States aboard a United States war frigate before they were able to advance further into Nicaraguan territory. The Costa Rican withdrawal and the capture of the filibusterers allowed Nicaragua to reclaim control of the San Juan route, and to immediately reject on January of 1858 the Treaty of Peace which circumstances had forced it to enter into with Costa Rica and which in any case had not entered into force.

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[55] Note from William Carey Jones, Special Agent of the United States of America to Central America, to Gregorio Juárez, Minister of Foreign Affairs of Nicaragua. Managua, dated 17 October 1857. Diplomatic Correspondence of the United States, Inter-American Affairs Department of State, 1831 -1860. William R. Manning, Volume IV. Washington, pp. 613-617. NCM, Annex 23.

[56] See, for example, "Nicaragua y Costa Rica". Edición del Centroamericano. 24 October 1857, NCM, Annex 80.

1.2.47 The rejection of these last agreements cleared the way for both Governments to negotiate, under less duress for Nicaragua, a Treaty of Limits that would definitively settle the territorial dispute, as well as the nature of the navigational rights that Nicaragua was willing to grant Costa Rica. This was accomplished in a single instrument, a solemn Treaty of Limits known as the Jerez-Cañas, of 15 April 1858[58].

CONCLUSIONS

1.2.48 The Costa Rican *Memorial* systematically differs from historical facts with regard to the period prior to the signature of the Jerez - Cañas Treaty of Limits of 1858. In effect, Costa Rica is not consistent with well known historical facts when it states in her *Memorial*:

a. That during the colonial period, the San Juan River did not belong exclusively to any of the Provinces that integrated the Captaincy-

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[57] CRM, Vol. 2, Annex 6.

[58] Jerez-Cañas Treaty, 15 April 1858; CRM, Vol. 2, Annex 7, pp. 54-60.

General of Guatemala[59]. This statement lacks historical support given that the San Juan de Nicaragua River belonged exclusively to the territorial district of the Province of Nicaragua since 1573.

b. That the colonial border between the Provinces of Nicaragua and Costa Rica was constituted by the Royal Charter dated 6 May 1541[60]. This statement is also inaccurate given that the border was ultimately determined by the later Royal Charter granted to Diego de Artieda on 1 December 1573[61].

c. That her first political constitutions (1825 and 1841) concurred in pointing out the colonial border between Costa Rica and Nicaragua[62]. This statement is inaccurate given that these texts do not concur on this question. The Constitution of 1825 accepted that the border was ruled by the principle of *uti possidetis iuris* and hence by the limits set by the Royal Charter of 1573. The constitutional text of 1841 ignores this in order to justify the illegal annexation of Nicaragua's District of Nicoya.

d. That prior to the Jerez-Cañas Treaty of Limits (1858), Costa Rica unilaterally or jointly with Nicaragua participated in the canalization or transit contracts granted in the San Juan River and Lake of Nicaragua[63]. This statement lacks any historical or documentary support given that Costa Rica did not participate

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[59] See CRM, para. 2.08.
[60] See CRM, para. 2.09 and Vol. 2, Annex 2.
[61] Royal Charter granted to Diego de Artieda, 1 December 1573; NCM, Annex 86.
[62] See CRM, para. 2.13.
[63] See CRM, para. 2.16.

effectively in any unilateral or joint exploitation with Nicaragua of passenger transit through the San Juan de Nicaragua River.

e. **That during the period of the National War or Filibuster War (1856-1857), Costa Rica remained active in the region of the San Juan de Nicaragua River and controlled the fluvial steamers that were destined to develop the concession (for passenger transit) that was granted to the Accessory Transit Company**[64]**. This statement is misleading since it fails to mention that it was a temporary and illegal military occupation by Costa Rica in the San Juan de Nicaragua River, and furthermore, that the illegal concession contract granted by Costa Rica never entered into force. This episode simply reflects a blatant attempt by Costa Rica to implement her occupation of Nicaraguan territory by force,** ***manu militari,*** **an attempt which was rejected by Nicaragua and denounced by the international community.**

1.2.49 Nicaragua, on the other hand, has furnished documentary evidence that when she entered into the negotiation of the Jerez-Cañas Treaty of Limits of 1858, she had exclusively the dominion and sovereignty of the San Juan de Nicaragua River and that the District of Nicoya was part of her territory under the principle of *uti possidetis iuris*. Under these circumstances, Nicaragua undertook a negotiation that entailed surrendering to Costa Rica her rights to the District of Nicoya with the purpose of being able to peacefully and undisturbed enjoy her exclusive dominion and sovereignty over the waters of the San Juan de Nicaragua River. The very narrow and limited right of free navigation with articles of trade, or wares, (objetos de

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[64] See CRM, para. 2.21.

comercio) that was also granted to Costa Rica in part of the San Juan de Nicaragua River, should be understood within the context of the 1858 Treaty of Limits.

Section 1.3

Precedents and subsequent practice related to the 1858 Jerez – Cañas Treaty

1.3.1 As indicated in the previous section, after independence in 1821 there were several diplomatic attempts to settle the controversy originating in Costa Rica's ambitions over the San Juan de Nicaragua River. Some of the Agreements resulting form these diplomatic endeavours were not ratified by either side, others were ratified by one or the other. None were valid. Their importance lies in their usefulness as *travaux préparatoires* to the 1858 Treaty of Limits,[65] and thus as a means of understanding the careful wording of this Treaty. These instruments were also taken into consideration in the interpretation of this Treaty by the Award rendered by President Cleveland in 1888[66].

1.3.2 Concurrently with these Agreements, Nicaragua signed a series of Transit Concessions and Canal Contracts which were not objected by Costa Rica and hence indicate what the Parties understood to be their respective rights at that point in time.

1.3.3 Other documents are also of assistance in this interpretation such as the written instructions or briefing papers given by the Government of Costa Rica to her negotiators, the Yearbooks of the Costa Rican Foreign

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[65] Jerez-Cañas Treaty, 15 April 1858; CRM, Vol. 2, Annex 7, pp. 54-60.

[66] CRM, Vol. 2, Annex 16.

Ministry, the exchange of notes between the two countries or of either government with third parties and the statements made by authorities on both sides.

A. PRECEDENTS TO THE 1858 TREATY

1. Treaties

1.3.4 At a very early stage of independent life, when territorial differences sprung forth, several attempts were made to settle these issues; for instance, through The Treaties of Granada of 16 August, 1823[67] and León of 9 September 1823[68]. Although these treaties were not ratified, the language is revealing, for they confirm Nicaragua's sovereignty over the San Juan de Nicaragua River.

1.3.5 Nicaragua's exclusive sovereignty over the San Juan River and Costa Rica's restricted right to navigation on said river are referred to in other texts prepared by the parties during this same period. In the Marcoleta-Molina Treaty of 28 January 1854, it is established that "the citizens of Costa Rica shall be allowed to freely enter and leave by the port of San Juan with their vessels and merchandise, and to navigate, ***except by steamer*** on the Sarapiquí River and the tributaries of the San Juan River…"[69] (emphasis added).

1.3.6 This Treaty also clearly shows that Nicaragua had dominion and possession of the San Juan River and that Costa Rica acknowledged this situation as is evident from the Costa Rican attempts to obtain authorization to navigate the San Juan River. The Treaty also evinces that at the time Nicaragua did not consider granting any rights of navigation to Costa Rica in the San Juan River with steamers. Furthermore, that the right granted by Nicaragua to Costa Rica in relation to a limited navigation on the San Juan referred only merchandise.

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[67] Montealegre-Velasco Treaty. Granada, 16 August 1823, NCM, Annex 1.
[68] Montealegre-Solis Treaty. León, 9 September 1823; NCM, Annex 2.
[69] See NCM Chap. 2, paras. 2.125 and 4.1.41, Annex 4.

1.3.7 This Treaty also confirmed what had already been indicated in the Webster–Crampton Propositions of 1852[70], which excluded Costa Rican navigation by steamers with passengers.

1.3.8 On 6 July 1857 the Juarez-Cañas Treaty[71] was concluded with the objective of entering into a definitive treaty of limits between the two countries. This treaty recognizes that Guanacaste is "from now and forever" [72] part of Costa Rica and that Costa Rica shall freely use the waters of the San Juan River to navigate and transport articles of trade (objetos de comercio). Although the treaty was not ratified by Costa Rica, the negotiations carried out at the time by the parties showed the intention of both governments to achieve an integral territorial agreement, attributing Guanacaste to Costa Rica; exclusive sovereignty over the San Juan River to Nicaragua; and the restricted right of free navigation over said river (with articles of trade) to Costa Rica.

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[70] Webster- Crampton Propositions, 30 April 1852, NCM, Annex 88 and below paras. 1.3.19-1.3.20.

[71] CRM, Vol. 2, Annex 5 and NCM, paras. 1.2.38-1.2.39 and 2.1.26.

[72] CRM, Vol. 2, Annex 5.

2. Canalization Contracts and Related Treaties signed before 1858

1.3.9 As indicated above, Nicaragua also concluded a series of contracts with private foreign companies, as well as treaties with other states in relation to concessions for the transit of passengers and for cutting an interoceanic canal through Nicaragua that would make use of the San Juan River. These contracts signed with private parties and the treaties then concluded by Nicaragua regarding these same matters, clearly confirm Nicaragua's full exercise of sovereignty over the San Juan River, including the exclusive right to navigate with passengers and the consequential and equally exclusive right to grant concessions and concede the right to navigation with passengers on the river. That is the reason why this right was expressly excluded from all agreements with Costa Rica prior to and including the Treaty of Limits of 1858. This right has never been the subject of negotiation. Nicaragua has always had, as will be seen and confirmed below, the exclusive right to navigate the river with passengers.

1.3.10 The contract signed with the *American Atlantic and Pacific Ship Canal Company*[73] *(Canal Company)*, ratified by the Nicaraguan Assembly on 26 September 1849, granted the company the exclusive right and privilege to build a maritime canal, at her own expense and through Nicaraguan territory, from the port of San Juan de Nicaragua to any other point in the Pacific.[74] The building of the canal would conclude within twelve years and the term of the contract was 85 years. Additionally, the company obtained exclusive rights of passenger transit by steamship.

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[73] Canalization contract entered into by the Government of Nicaragua and a company formed by U.S. citizens. Zepeda-Juárez-White. León, Nicaragua, 27 August 1849; NCM, Annex 14.See above para. 1.2.32.

[74] *Ibid.*

1.3.11 Article 23 of the concession contract granted to the Canal Company provides: "The *exclusive right* acquired by the Company under this contract *to navigate* on the lakes, rivers and waters of the State [Nicaragua] *with steamships*, from one sea to the other, shall be understood not to preclude natives from free inland navigation on sailboats or any other type of vessels *other than steamships*".[75] (Emphasis and explanation added).

1.3.12 Article 32 reads as follows: "The State [Nicaragua] also agrees to protect and defend the Company with respect to the full enjoyment of the rights and privileges granted thereto under this contract, and also agrees not to grant or contract to any Government, individual, or any other company the right to build a maritime canal, railroad, or any other inter-oceanic route through its territory, *or the right to navigate on the rivers and lakes occupied by the Company for steamships, as long as this contract remains in force*. However, if this contract ceases to have effect, then the State shall be free to contract any other individuals or companies, as it may deem most convenient."[76] (Emphasis and explanation added).

1.3.13 It should be noted that in assigning the concession *ut supra*, Nicaragua acted as exclusive territorial sovereign and administrative grantor, without any participation whatsoever by the Republic of Costa Rica. It is therefore surprising to learn that, Costa Rica, in her *Memorial* submitted before this Court, asserts without providing supporting evidence that: "Most of these contracts and treaties were negotiated with Nicaragua, although the earliest contracts were negotiated by the Central American Republic and subsequent to the dissolution of the federation Costa Rica was also closely involved as a Party, solely or jointly." [77]

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[75] NCM, Annex 14.

[76] *Ibid.*

1.3.14 In 1851, the Canal Company was reorganized, without affecting the original concession granted by the Government of Nicaragua. The part relating to steamship navigation in the waters of Nicaragua was separated from the contract of 27 August 1849, and transferred to the White-Chamorro-Mayorga Canal Convention[78], which was ratified by Nicaragua through a decree issued on 20 August 1851. This spun off the Accessory Transit Company, which was limited to transporting passengers through the Nicaraguan route.

1.3.15 The "Accessory Transit Company," whose steamships -in 1854 alone, transported 13,128 passengers from New York to San Francisco and 10,461 passengers from San Francisco to New York, just 447 less than the Panama route, which it had surpassed by 2,130 passengers during the previous year. Further, the company had built a macadam road between the port of San Juan del Sur in the Pacific and the port of La Virgen on the Lake (in other words, along the isthmus of Rivas) and Nicaragua had an established port and customs facilities.[79] After all, Commodore Vanderbilt's company had netted 5 million dollars during its first year of operations.[80]

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[77] CRM, para. 2.16.

[78] NCM, Annex 3. Chamorro-Mayorga-White Convention. Granada, Nicaragua, 14 August 1851.

[79] Folkman Jr., David I.; "The Nicaragua Route". University of Utah Press, Jr. Salt Lake City: 1972; Appendix B "Passangers by the Isthmian Routes 1848-1869." p. 163.

[80] Berman, Karl: Under the Big Stick: Nicaragua and the United States since 1848", South End Press, Boston, 1986, p. 32.

1.3.16 In this canal contract, a clear distinction is made between "steam" ships and "sail" ships. The former are related to passengers and the latter to merchandise (Articles 20, 25 and 32). Similarly, the treaty affirms the exclusive right acquired by the company to "navigate on the lakes, rivers and waters of the State with steamships, from one sea to the other ..."[81] Nicaragua, on the other hand, commits not to "...grant or contract to any Government, individual, (...) the right to navigate on the rivers and lakes occupied by the Company for steamships,"[82] demonstrating that this right was never granted to Costa Rica.

1.3.17 Nicaragua also agrees "...not to grant or contract to any Government, individual, or any other company the right to build a maritime canal, railroad, or any other inter-oceanic route through its territory, or the right to navigate on the rivers and lakes occupied by the Company for steamships, as long as this contract remains in force..."[83] This clearly emphasizes again Nicaragua's exclusive rights with respect to the San Juan River, in particular in this context, to transport passengers and to grant concessions for said transport.[84]

1.3.18 An off-shoot of the Clayton-Bulwer Treaty was the so-called Crampton-Webster Propositions of 30 April 1852. This procedure involving the Parties to the Clayton-Bulwer Treaty attempted to settle the differences between Nicaragua and Costa Rica. For present purposes what is relevant is that reference is made to the exclusive right of Nicaragua to navigate and dispose of navigation in the San Juan by steam boats.

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[81] NCM, Annex 14. Article 23.

[82] NCM, Annex 14. Article 32.

[83] *Ibid.*

[84] By Chamorro - Mayorga - White, Transit Company Convention of 14 August 1851, the Company was entitled and enjoyed the protection of the Government of Nicaragua on the same terms as those stipulated in the original treaty of 27 August 1849 and its amendment of 11 April 1850, regarding the construction of the maritime canal; NCM, Annex 3.

1.3.19 It is also relevant to underline that the Clayton-Bulwer Treaty and the Webster-Crampton Propositions coincide in that they recognize not only Nicaragua's territorial sovereignty over the San Juan River, but also that Nicaragua is the only State authorized to grant concessions for canalization and the transit of persons on the San Juan River. In effect, the Proposition states that "It is understood however that Costa Rica retains the right in common with Nicaragua to navigate said rivers and lake by sail vessels, barges or vessels towed *but not by steam* but this right is in no wise to interfere with the paramount right in Nicaragua or her grantees to appropriate the waters of said rivers and lake to a ship canal from Ocean to Ocean or from the Caribbean Sea to said lake…."[85] Costa Rica approved by Decree the Crampton-Webster Propositions, accepting, consequently, the validity of the exclusive concessions granted by Nicaragua for transit of passengers through the San Juan River.[86] It is important to highlight that Costa Rica accepted the Propositions by Congressional Decree, [87] whilst Nicaragua did not approve it.

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[85] Crampton-Webster Propositions, 30 April 1852, NCM Annex 88. Article 3.

[86] The propositions provided a recommendation in Article 3 fixing the limits between Nicaragua and Costa Rica: "…shall begin on the South Bank of the Colorado at its confluence with the sea at high water mark on said river thence along said South Bank also at high water mark to the confluence of the Colorado with the river San Juan thence at *hight water mark along the South Bank of the San Juan* to its source on lake Nicaragua thence at high water mark along the South and West Shore of that lake to the point nearest the mouth of the river La Flor River thece by a direct line drawn from that point to the mouth of the said river in the Pacific Ocean…Costa Rica retains the right in common with Nicaragua to navigate said rivers and lake by sail vessels, barges or vessels towed *but no by steam…*" (emphasis added).

[87] The decree consists of only one article, as follows: "Single Article. The assent, adhesion and subscription that the Supreme Government of the Republic of Costa Rica has accorded through act of 16th of the current month to the bases agreed upon in Washington on 30th of April, by Representatives of the Governments of Great Britain and the United States, for as settlement between the Republic of Costa Rica and the State of Nicaragua over the issue of territorial limits

1.3.20 These instruments show that Costa Rica implicitly accepted that Nicaragua held the exclusive right to grant licenses for construction of the route and also to grant the exclusive right to navigate with passengers. This right was always exercised by Nicaragua, even after 1858, as is verified in the Nicaraguan Decree of 11 September 1862, which asks that "the authorities of the border (of Nicaragua) not to allow the crossing of foreign persons without them presenting passports…"[88] Costa Rica was not excluded from this regulation. The only exception refers to the Transit Company.

1.3.21 The Irisarri- Stebbins Contract[89] confirms Nicaragua's right over the river and over passenger transport, granting to the company in question a concession that authorizes and regulates transport.

1.3.22 By means of the Cass-Irisarri Treaty of 16 November 1857,[90] Nicaragua again concedes the right of transit with passengers via the river, this time to citizens and properties of the United States, thus reaffirming the country's exclusive right to transport passengers on the river. In this text, Nicaragua granted the United States and her citizens and properties the right to transit between the Atlantic and Pacific oceans through the territory of the former Republic using any route or means of transportation. However, the Republic of Nicaragua reserved the right of sovereignty over said route or means of communication. The Irisarri-

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pending between the both countries, is hereby approved." It is very clear that Costa Rica accepted that the right to transport passengers belonged to Nicaragua (navigation by steam). CRM, Vol. 6, Annex 199.

[88] Decree "Ordering the commanders of ports and perfects of the frontiers of Nicaragua not to permit any foreign person to go into the interior of the country, unless presenting a passport issued by the respective ministers or consuls at the ports or places of their departure". Nicaragua, 11 September 1862. Article VII. NCM, Annex 58.

[89] Irisarri-Stebbins Contract, New York, 19 June 1857. NCM, Annex 15.

[90] Cass-Irisarri Treaty. Washington, 16 November 1857. NCM, Annex 5.

Stebbins Contract (19 June 1857), and the Cass–Irisarri Treaty (16 November 1857) clearly demonstrate that at the time of the signing of the Jerez-Cañas Treaty, of 1858, Nicaragua had the exclusive right to navigate with passengers on the river.

B. THE TREATY OF LIMITS OF 15 APRIL 1858

1.3.23 The Jerez-Cañas Treaty of Limits signed on 15 April 1858, was a comprehensive settlement of the disputes involving the territorial limits between the two countries. Nicaragua, as part of the negotiations, gave up the territories of Nicoya and to the south of the lower right margin of the San Juan River, whilst Costa Rica recognized the dominion and exclusive sovereignty of Nicaragua over the San Juan River. Nicaragua further granted to Costa Rica perpetual rights of free navigation, restricted to articles of trade in a limited section of the river.

1.3.24 Thus, Article 2 of the treaty determines the limits between the two countries but at the same time confirms the sovereignty of Nicaragua on the San Juan River and regulates the rights of the parties over the same. The Treaty gives to Nicaragua the full exercise of sovereignty over the entire course of the waters and a limited right of navigation to Costa Rica "*con objetos de comercio*" (with articles of trade)[91] as is established in its Article 6.

1.3.25 The fundamental character of the 1858 Treaty and the 1888 Arbitral Award in relation to the boundary limits and Nicaragua's exclusive sovereignty over the San Juan River, and the rights established therein, have always and reiteratively been acknowledged by the two States.

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[91] CRM, Vol.2, Annex 7, pp. 54-60, Article 6.

1.3.26 A clear recognition of this in recent times may be seen, for example, in the Note addressed to the Minister of Foreign Affairs of Nicaragua on 12 August 1998, by the Minister of Foreign Affairs of Costa Rica, in referring again to the 1858 Treaty and 1888 Arbitral Award, stating that "Costa Rica has never intended to exercise more or less rights other than those granted by said instruments…"[92]

1.3.27 And, in another Note addressed to the Minister of Foreign Affairs of Nicaragua on 22 May 2000, by the Minister of Foreign Affairs of Costa Rica, the Government of Costa Rica reiterates that "It is a question, rather, of a special regime established by a Treaty and an Award that are characteristic of and specific to Public International Law…"[93]

1.3.28 This recognition is reiterated in the same manner by the President of the Republic of Costa Rica in a Note addressed to the President of Nicaragua on 29 July 2000, which recognition is even more precise in relation to the nature and relationship between the two instruments, stating as follows:

> "b) that, in accordance with the Cleveland Award of 1888, which constitutes an obligatory interpretation of the Cañas-Jerez Treaty of Limits of 1858…. c) that since 1888 nothing has occurred to change this legal status."[94]

1.3.29 Also, in official documents, the Government of Costa Rica has recognized these instruments as governing relations between the two countries in part of the San Juan River. Thus, the Yearbook of the Ministry of Foreign

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[92] CRM, Vol. 3, Annex 50.

[93] CRM, Vol. 3, Annex 63.

[94] CRM, Vol. 3, Annex 66.

Affairs and Worship of Costa Rica, corresponding to the year 2001-2002, affirms that:

> "...on 11 January: Chancellor Roberto Rojas, in referring to aspects related to Nicaragua, emphasized that Costa Rica's perpetual rights of free navigation in the San Juan River are those established in the Cañas-Jerez Treaty and clarified by the 1888 Cleveland Arbitral Award. 'Costa Rica does not want any right that does not correspond to it according to those international instruments..."[95]

1.3.30 Likewise, other government agencies have made the same reference in relation to the juridical regime of the San Juan River. This is the case of the document published in 1997 by Costa Rica's Ministry for the Environment and Energy, together with Nicaragua's Ministry for the Environment and Natural Resources, with support from UNEP (United Nations Environment Programme) and the OAS (Organization of American States), regarding environmental and sustainable development management in the basin of the San Juan River, which states as follows:

> "The Governments of the Republics of Costa Rica and Nicaragua reiterate that the approval of this document and other related documents, as well as the technical concepts contained therein, including the concept relating to the 'basin of the San Juan River', do not affect the territorial limits and rights consigned in the Cañas-Jerez Treaty of Limits, the Cleveland Award, the Matus-Pacheco Convention and the Records of the Alexander Commission."[96]

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[95] Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica, 2001-2002. Pp. 143-144; NCM, Annex 79.

[96] "Manejo Ambiental y Desarrollo Sostenible de la Cuenca del Río San Juan. Estudio de Diagnóstico de la Cuenca del Río San Juan y Lineamientos del Plan de Acción". United Nations Environment Programme, Washington, 1997, p. iv.

1.3.31 The Treaty of 1858, interpreted in 1888, has not been explicitly or implicitly modified. The rights and obligations of the parties with respect to the use of the San Juan River are –only- those established by said parties in the Treaty of Limits, concluded in 1858 and interpreted in 1888.

C. THE PERIOD FROM 1858 TO 1888

1.3.32 A series of bilateral treaties were signed from 1858 to 1888[97] that also serve to clarify the meaning of certain expressions such as "articles of trade" (*objetos de comercio*). It is clear that this expression was used in all cases to mean "objects" in the sense of "things", in spite of the erroneous and self serving interpretation proposed by Costa Rica that this phrase really means "purposes of commerce" (*fines de comercio*)

1.3.33 The Alvarez-Zambrana Treaty of 5 February 1883 reaffirms "the eminent dominion" and "sovereignty" [98] of Nicaragua over the San Juan and Colorado rivers. This is also included in the Navas-Castro Treaty of 19 January 1884,[99] which also sets the border in the zone. The abovementioned Alvarez-Zambrana Treaty also establishes the obligation "to fly, in addition to one's own, the national flag of the State that exercises sovereignty."[100] A similar reference is made in the Navas-Castro Treaty of 19 January 1884.[101] Without any support Costa Rica claims in her *Memorial*, that Nicaragua violates her international obligations when she requests Costa Rican vessels navigating the river also to hoist the flag of Nicaragua. Apart from this express conventional obligation, the Government of Nicaragua has noted that "…[t]his act is considered one of respect and recognition of the exercise of sovereignty on the said waters…"[102]; in this case, the San Juan River.[103]

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[97] These texts include the Zelaya-Volio Convention of 13 July 1868, completed in order to improve one of the two Atlantic ports: that of San Juan del Norte or that at the mouth of the Colorado; NCM, Annex 6, the additional Rivas-Esquivel Convention of 21 December 1868, by means of which Costa Rica concedes to Nicaragua the waters of the Colorado River so that, by changing their course, the port of San Juan may be reestablished or improved; NCM, Annex 7, the Carazo-Soto of 26 July 1887 CRM, Vol. 2, Annex 15.

[98] Alvarez-Zambrana Treaty, 5 February 1883. Article 3 reads: "... corresponding to Nicaragua the eminent dominion and sovereignty over the aforesaid rivers [San Juan y Colorado] and lake..."; NCM, Annex 9.

[99] Navas-Castro Treaty of Limits of 19 January 1884 was approved by the Government of Nicaragua on 14 May 1884; NCM, Annex 10. Article 1 reads: "The boundary line between the Republics of Nicaragua and Costa Rica is the right bank of the Colorado River, from its mouth in the Atlantic Ocean until it separates from the San Juan River, thence it follows the right bank of that River to a point at a distance of three English miles from the exterior fortifications of the Castillo Viejo; thence it runs along the circumference of a circle with a radius of three English miles from the exterior fortifications, and ends on the same right bank of the San Juan River; thence from this same bank up to a distance of three English miles from a point on the bank in front of the San Carlos fort; thence it runs along the circumference of another circle, with a radius

1.3.34 The discussion about the validity of the Treaty of 1858, that was questioned by Nicaragua at least since 1871, led to the completion of the Román-Esquivel-Cruz Arbitral Convention of 24 December 1886,[104] to definitively resolve the matter[105] and, in the event that the Arbiter decided that the treaty was valid, to interpret it in order to determine whether Costa Rica had the right to navigate the San Juan River with men-of-war or

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of three English miles and at the center the aforesaid boundary point on the same bank in front of the San Carlos fort; from there to the mouth of the Frio River, in the Lake of Nicaragua, following the bank of this river to the mouth of the Sapoá River; and from this point an astronomic straight line extending to the center of Salinas Bay, demarcated by the intersection of its largest and smallest axis.

[100] Alvarez - Zambrana Treaty, Article. 3 "…In recognition to the respective sovereignty of both Nations, the vessels of the one entering into the waters of the other shall hoist, in addition to its own flag, the flag of the other in the respective place."; NCM, Annex 9.

[101] NCM, Annex 10, Navas-Castro Treaty. Article XI reads at the end that ".… In recognition to the respective sovereignty of both Nations, the vessels of one nation entering the waters of the other shall hoist, in addition to its own flag, the flag of the other in the respective place."

[102] CRM, Vol. 3, Annex 72, Note dated 3 August 2001.

[103] NCM, paras. 5.3.1-5.3.4.

[104] NCM, Annex 11, Article I reads: "The question pending between the contracting Governments in regard to the validity of the Treaty of Limits of the 15th April, 1858, shall be submitted to arbitration".

[105] *Ibid*, Article VII reads. "Whatever the decision of the Arbitration be, it shall be held to be obligatory between the Contracting Parties. No other recourse shall be admitted, and it shall into force 30 days after it has been communicated to both Governments or to their Representative."

revenue cutters. Furthermore, the Arbitrator could decide any other point expressly submitted by the Parties once the decision on the validity of the Treaty had been taken.[106] The question of navigation with passengers was not in dispute and thus was not submitted for decision by the Arbitrator.

1.3.35 On 22 March 1888, Arbiter Cleveland announced his Award.[107] The first part of the Award recognized the validity of the Treaty of Limits of 1858 and, having established this, the Arbitrator continued deciding on the points of doubtful interpretation that were submitted for his consideration.

1.3.36 The arbitral award definitively resolved the controversy proposed with respect to the San Juan River. This definitive nature of the arbitral decision is recognized in several Notes and official texts of the Costa Rican Government dating from 1886.[108] The Yearbook of the Costa Rican Ministry of Foreign Affairs clearly expresses such recognition: "…the President of the United States has proven himself worthy of the gratitude of Costa Rica and Nicaragua (…) for having put an end, with his illustrious decision, to the *sole motive for disagreement that separated*

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[106] NCM, Annex 11, Article VI reads: "If the decision of the Arbitration declares the validity of the Treaty, the same award shall declare whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats. Also the decisions aforesaid shall, in case of the validity of the said Convention, decide the other points of doubtful interpretation found by either of the Parties in the Treaty, and communicated to the other Party within 30 days form the exchange of the ratifications of this Convention."

[107] CRM, Vol. 2, Annex 16.

[108] NCM, Annex 29, Note of 31 October, 1886, from the Costa Rican Minister of Foreign Relations, Ascension Esquivel, to the Nicaraguan Minister of Foreign Affairs; NCM, Annex 33, 30 July 1887, from the Costa Rican Delegation in Washington to the US Secretary of State; NCM, Annex 35; 23 March 1888, from the Costa Rican Delegation in Washington to the US Secretary of State, and NCM, Annex 37 Note from the National Palace to the Minister of Foreign Relations, dated 9 August 1895.

these two countries[109] (emphasis added). A similar affirmation is made in the 1900 Yearbook of the same Ministry.[110]

1.3.37 The Government of Costa Rica has clearly recognized on several occasions that the Arbitral Award of 1888 is definitive and binding and that, until now, together with the Treaty of Limits of 1858, forms the juridical regime applicable to the San Juan River, without any change in this juridical situation having taken place. This manifestation was made, most recently, in 2000 by the President of Costa Rica, Miguel Angel Rodríguez, who claimed the following: "… it was particularly pleasing to verify that we fully agree on three fundamental aspects:...b) that, in accordance with the Cleveland Award of 1888, which constitutes an obligatory interpretation of the Cañas-Jerez treaty of Limits of 1858 … c) that since 1888 nothing has occurred to change this legal status"[111].

D. PERIOD SUBSEQUENT TO 1888

1.3.38 In order to comply with the Treaty of Limits of 1858 and the Arbitral Award of 1888, based on the Convention of 24 December 1886 (Article I),[112] certain treaties were concluded between the two countries. The purpose was to demarcate the boundary between the two Republics, in the light of the Treaty of Limits of 1858 and the Arbitral Award of 1888.[113] On

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[109] NCM, Annex 75. Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica. 1888, pp. 3-4.

[110] NCM, Annex 76. Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica. 1900, pp. 10-11.

[111] CRM, Vol. 3, Annex 66, Note of 29 July 2000.

[112] NCM, Annex 11.

[113] Among them, the Guerra-Castro Treaty of 23 December 1890, ratified by Nicaragua on 11 November, 1891, which article II reads: "The Commissioners appointed by the Governments of Costa Rica and Nicaragua to carry out the demarcation of the boundaries between the two Republics, according to the provisions of the Treaty of 15 April 1858 and the Arbitration Convention signed at the city of Guatemala on 24 December 1886, will proceed to its

27 March 1896 the Matus-Pacheco Treaty was signed by means of which both Parties agreed to establish a Commission of three Engineers, one appointed by each Party and the third one by the President of the United States. This third Commissioner appointed by the President was General E.P. Alexander.

1.3.39 Implementation of the Treaty of Limits of 1858 took place through the five Awards of Arbitrator Alexander, issued between 1897 and 1900, all in accordance with Article IX of the Convention of December 1886. Although these awards referred to the demarcation of the border agreed to earlier, Arbitrator Alexander presented conclusions very pertinent to the effects of establishing the applicable juridical regime. In his first Award, on 30 September 1897, Arbitrator Alexander affirms that the interpretation to be given to the Treaty of Limits of 1858 had to be in accordance with "the way in which it was mutually understood at the time by its makers."[114]

1.3.40 Consideration of the Treaty of Limits of 1858 and the Arbitral Award of 1888 as constituting the applicable juridical regime is also confirmed in

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implementation on the Atlantic side, tracing a straight line, beginning at a point on the coast in front of the sea, two hundred meters east from the seawall being built by the Canal Company, and ending at the extremity on the right bank of the nearest stream of the San Juan River. From this point, the line shall continue along the right bank of the same stream up to the right bank of the Ánimas stream and that of the San Juan River, until it reaches the point indicated in the Treaty of 1858..."; NCM, Annex 12. The Matus-Pacheco Convention of 27 March 1896, ratified by Nicaragua on 25 September 1896; CRM, Vol 2, Annex 17 and the Matus-Pacheco-Lainfiesta Treaty of Peace of 26 April 1898, where the parties agreed to submit their mutual complaints and claims to the decision of a tribunal made up of three Central Americans citizens, one appointed by the Greater Republic of Central America, one by the Republic of Costa Rica, and a third by the Republic of Guatemala, the latter in the role of peaceful mediator. (Art. III). NCM, Annex 13. It is also important to underline that both Parties declare that no claims shall be submitted to the Arbitrator regarding the boundary questions that were resolved in the Treaty of 15 April 1858, in the arbitral award of President Cleveland, or in the San Salvador Convention of 1896.

[114] CRM, Vol 2, Annex 18.

subsequent treaties. In the Pact of Amity of 21 February 1949,[115] in which the countries agree to the peaceful resolution of conflicts, and in the Agreement concluded based on Article IV of the Pact of Amity of 21 February 1949, Nicaragua and Costa Rica agreed that they

> "...shall collaborate ...in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River *within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888...*"[116] (Emphasis added)

1.3.41 More recent texts demonstrate Costa Rica's recognition of Nicaragua's rights over the San Juan River and, in particular, the right to adopt measures applicable to tourism in her territory, particularly on said river. The Memorandum of Understanding, signed in 5 June 1994, the Ministries of Tourism of the two countries "in strict compliance with directives from the Presidents of the Republics of Nicaragua and Costa Rica, in their meeting of May the twenty ninth, nineteen hundred and ninety four, in San Juan del Sur, Nicaragua." literally states that Costa Rica must purchase tourist cards from Nicaragua. The language used is clear and leaves no doubt regarding "the obligation [Costa Rica has] to [purchase tourist cards]" [117] and to register Costa Rican tourist businesses.

1.3.42 Commenting this Memorandum of Understanding, President Pacheco of Costa Rica stated that it demonstrated that Nicaragua has the sole right to regulate tourism on the waters of the San Juan River and that Costa Rica consequently, does not have the right to free navigation for tourism purposes under the 1858 treaty. This question is also dealt with later, in

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[115] CRM, Vol 2, Annex 23.

[116] CRM, Vol 2, Annex 24.

[117] CRM, Vol 2, Annex 26, numeral 3, letter b.

2002, in the Declaration of Alajuela signed by the Minister of Foreign Affairs of both countries.[118]

1.3.43 In 1998, a dispute was artificially brought about when Costa Rica sought to navigate the San Juan River with military weapons, without the respective authorization or permission from Nicaraguan authorities. This motivated Nicaragua to terminate the concession of operational permits that she had been granting to Costa Rica within a framework of cooperation and neighborliness during the period from 1995 to 1998, as an act of "border courtesy" and never as an act that could be construed as a juridical relationship. With a renewed spirit of cooperation with Costa Rica, Nicaragua initiated almost immediately a process of conversations and exchanges of notes that, ultimately, did not result in the reestablishment of the *modus operandi* that formerly existed, since Nicaragua maintained her willingness to cooperate based, as had been the case at the time, on permits requested from the sovereign nation for each case and on a temporary basis. Costa Rica finally made clear that it sought the right of armed navigation -although temporary and according to each case- subject to a simple notification to be given to the Nicaraguan Authorities. This did not meet the requirements of the necessary request that Nicaragua was entitled to as sovereign.

1.3.44 The initiation of incursions of vessels that transported public forces of Costa Rica, without permission, in Nicaraguan territory and particularly on the waters of the San Juan River, led to Nicaragua's adoption of measures to regulate the situation. In this way, on 14 July 1998, the Government of Nicaragua, in full exercise of its sovereignty over the San Juan River, prohibited the navigation of Costa Rican vessels that transported members of the public forces carrying arms. This alleged "right" to navigate the river with arms, as clearly stated by the Minister of Foreign Relations of Nicaragua in a Note addressed to the Minister of Foreign Relations of Costa Rica on 23 April 2002, is not one of "…the rights of navigation other than those enunciated in the Jerez-Cañas Treaty and the Cleveland Award, the provisions of which we must strictly adhere to."[119]

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[118] CRM, Vol. 2, Annex 29.

1.3.45 Faced with the persistence of the existing differences, due to Costa Rica's pretensions over the San Juan River, the Ministers of Foreign Relations of the two countries met in Alajuela and adopted a Declaration on 26 September 2002.[120] This Declaration granted reciprocal concessions that once more demonstrate the right of each of the parties to impose administrative and control measures in their respective territories, with the San Juan River and the totality of its waters being Nicaraguan territory.

Conclusions

1.3.46 The 1858 Treaty of Limits and the 1888 Cleveland Arbitral Award make up the Applicable Legal Regime on the San Juan de Nicaragua River. This condition has been repeatedly recognized by both parties since 1888. This regime clearly sets the limits between the two countries. These limits were demarcated precisely by the Alexander Arbitral decisions rendered between 1897 and 1900. These awards were designed to be a cartographical exercise but the Arbitrator, nevertheless had to determine the Applicable Law in order to set the border marking stones in the appropriate places. Alexander's instruments reiterate Nicaragua's sovereignty over the river and confirm the restricted nature of Costa Rica's right of free navigation, a) physically, over a part of the river and juridically, covering only the transportation of things, wares, goods or more specifically "articles of trade".

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[119] CRM, Vol. 3, Annex 75. Note from the Minister of Foreign Affairs of Nicaragua (MRE/DM-JI/481/04/02), dated 23 April, 2002 and addressed to the Minister of Foreign Affairs and Worship Affairs of Costa Rica.

[120] CRM, Vol 2, Annex 29.

1.3.47 The preparatory work of this Treaty of Limits cannot be appreciated with the usual drafts prepared and discussed during the phase of negotiation of the Treaty, which was only scantily recorded, but by all treaties and contracts negotiated and concluded by the parties before 1858. Careful reading of these texts can explain the nature and scope of the rights and obligations of the parties in regards to the uses of the river and provide a context for the text of the 1858 Treaty of Limits. Special attention is called to the several ways in which the phrase (objetos de comercio) "articles of trade" was used in these texts to define the extent of the right of navigation of Costa Rica.

1.3.48 The analysis of relevant documents as presented above, leads to the inescapable conclusion that Nicaragua always exercised sovereignty over the San Juan de Nicaragua River, including the policing of its waters and the regulation of all navigation on the river and, further more, enjoyed the exclusive and historical right for the transport of passengers. The Costa Rican right of Free Navigation granted by those documents that make up the applicable law, is not absolute, it is restricted geographically and limited to the transportation of "wares", or "articles of trade" as defined by the Spanish term *objetos de comercio*.

1.3.49 The Parties have repeatedly recognized that all territorial differences between them, and in particular those related to the San Juan River, were definitively settled by the Treaty of Limits and the Cleveland Arbitral Award that validated and interpreted it and that these instruments are binding and definitive and admit no recourse.

CHAPTER 2
NICARAGUA'S SOVEREIGNTY OVER THE SAN JUAN DE NICARAGUA RIVER

Section 2.1
Character, Object and Purpose of the 1858 Treaty

A. INTRODUCTION

2.1.1 The original title of the Treaty signed on 15 April 1858 is 'Tratado de Limites entre Costa Rica y Nicaragua'. The instrument is frequently referred to in English as the 'Treaty of Limits', as, for example, in the Cleveland Award of 1888. The object and purpose of the Treaty was to settle a long-standing dispute concerning title to territory. This aspect of the Treaty is evidenced by the text of the Treaty itself, by its negotiating history, by the prior treaties relating to the subject-matter, by the subsequent treaties, and by the text of the Cleveland Award of 1888.

2.1.2 The dispute between the parties relates to the nature of the rights of navigation appertaining to Costa Rica within the waters of the River San Juan, which waters are subject to the sovereignty of Nicaragua. It follows that the provisions concerning navigation appear in the particular context of a territorial settlement, and not in the different context of a Treaty creating a regime for an international river, such as the Rhine or the Danube. Thus, for example, the Treaty of 1858 does not create rights for third parties.

2.1.3 Costa Rica has not only recognised Nicaragua's sovereignty over the river in numerous notes and communiqués, but has explicitly recognised since the XIX Century the national character of the San Juan River, not only vis a vis Nicaragua but also to the Executive Committee (Dieta) of the Major Republic of Central America formed by El Salvador, Honduras and Nicaragua. At that time Costa Rica published a decree which was harmful to Nicaragua's sovereignty and prompted the reaction of the Executive Committee (Dieta) of the Major republic of Central America who wrote a note to Costa Rica dated 27 July 1897, pointing out that

> "When the State of Nicaragua became aware of it, it caused the overall impression that the abovementioned decree threatens the sovereignty of the Nation that has exclusive dominion and sovereign jurisdiction over the waters of the San Juan River, and Costa Rica only has the right to free navigation for purposes of commerce, from the mouth in the Atlantic up to three English miles before reaching *Castillo Viejo*; however, it is in no way authorized to transfer it to other nations, as inferred in the broad sense of the said decree, since it does not limit it to its national ships. Thus, the Government of the State of Nicaragua, in fulfillment of its duty to ensure their sovereign rights are upheld unharmed, has instructed the Diet, in which I am honoured to partake, to present the following protest to Your Excellency's Government..."[121]

2.1.4 Costa Rica's reply could not have been more candid. In a note of 31 July 1897, Ricardo Pacheco, Minister of Foreign Affairs and Worship answers Mr. E Mendoza in the following terms:

> "It takes no effort whatsoever to understand that the licence to introduce merchandise into the valleys that the decree refers to *has to be subordinate to the conditions set for the navigation of the San Juan River, and that this is an interior river, not open by its sovereign to foreign traffic.* It should be understood that such permit was referred only to Costa Rican ships, which under the Treaty of 58 and the

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[121] CRM,Vol. 3, Annex 37.

> Arbitral Award of President Cleveland, have a right to do it, which cannot in lack of a national authorisation, be utilised to embark and disembark products through ports not open to sea trade...." [122](emphasis added).

2.1.5 The *Memorial* tends to obscure the legal and historical context and to conduct the argument essentially on the assumption that the Treaty of 1858 consists of a single provision related to the rights of navigation of Costa Rica. In fact Article VI, the relevant provision, deals with the legal status of the waters of the San Juan River as such, and the drafting makes clear that the provision forms part of the overall territorial settlement. As the text stipulates:

> "The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan from its outlet from the lake until it empties into the Atlantic; but the Republic of Costa Rica shall have perpetual rights, in the said waters; of free navigation from the river's mouth to three English miles below Castillo Viejo for the purposes of commerce, [objetos de comercio] whether with Nicaragua or the interior of Costa Rica, by way of the rivers San Carlos or Sarapiquí or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic. The vesselsof both countries may indiscriminately approach the shores (atracar) of the river where the navigation is common to both, without the collection of any class of imposts unless so established by the two Governments..."[123]

2.1.6 In the conclusions to Chapter 4 of the Costa Rican *Memorial* the primary conclusion is as follows:

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[122] NCM, Annex 38.

[123] CRM, Vol. 2, Annex 7, pp. 54-60.

> "(1) Costa Rica has a conventional perpetual right of free navigation over the portion of the San Juan where it is a riparian State, and is entitled to exercise this right without restrictions or interference."[124]

2.1.7 Similar expressions are to be found in the diplomatic correspondence, as, for example, in the Costa Rican Note dated 19 August 1982:

> "I deplore that the Government of Nicaragua insists on denying what, by virtue of a standing Treaty, belongs to Costa Rica, that is, the perpetual, perpetual, and inviolable right that its vessels navigate, without any condition, on the San Juan River. Therefore, the Government of Costa Rica cannot, and does not accept, the unilateral, unlawful, and capricious interpretation that the Government of Nicaragua gives the Cañas-Jerez Treaty of 1858, ratified by the Cleveland Award in 1888. Much less, it cannot and does not accept, the thesis of the Government of Nicaragua that this country has the right 'to establish regulations over said river', in detriment of the right of Costa Rica, nor the thesis that Nicaragua has 'the obligation' to 'exercise acts of sovereignty and jurisdiction over that part of its national territory and over the vessels that navigate on it', in detriment of Costa Rica's right. This interpretation, which the Government of Costa Rica rejects, contradicts and limits what by virtue of the Treaty does not admit contradiction or limitation."[125]

B. THE PERTINENT PRINCIPLES OF TREATY INTERPRETATION: REFERENCE TO THE OBJECT AND PURPOSE

2.1.8 The interpretation and application of the provisions of Article VI of the instrument entitled 'Treaty of Limit between Costa Rica and Nicaragua' must be in accordance with its object and purpose. The modern law is set forth in Article 31 of the Vienna Convention on the Law of Treaties. As the Court will readily recall, the general rule of interpretation set forth in Article 31 includes as its basic provision, in paragraph 1:

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[124] CRM, para. 4.129.

[125] CRM, Vol. 3, Annex 45.

> "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose."

2.1.9 The object and purpose of the Treaty of 1858 was to effect a territorial settlement and was consequently related to the resolution of questions of sovereignty. The evidence of this will be reviewed in due course. The main focus was thus the determination of boundaries and not the creation of a regime of fluvial navigation for the States of the region.

2.1.10 The principle of reference to the object and purpose is affirmed in all the major authorities, including the following:

(i) McNair, *The Law of Treaties*, 1961, pp.380-81.
(ii) Rousseau, *Droit International Public*, Vol. I, 1970, pp.272-73, para. 241.
(iii) Jennings and Watts (editors), *Oppenheim's International Law*, Vol. I, Peace, 9th ed., 1992, pp.1271-73.
(iv) Podesta Costa and Ruda, *Derecho Internacional Publico*, Vol. 2, 1985, pp.103-5.
(v) Pastor Ridruejo, *Curso de Derecho Internacional Publico*, 2nd ed., 1987, pp. 120-21.

2.1.11 This Court has referred to the object and purpose of a treaty on several occasions, including the *Nicaragua Case*, I.C.J. *Reports*, 1986, page 136 paragraph 271; and the *Case Concerning Border and Transborder Armed Actions, ibid.*, 1988, page 89, paragraph 46; *Case Concerning the Gabcikovo – Nagymaros Project, ibid.*, 1997, page 76 paragraphs 133-47; *La Grand Case, ibid.*, pages.501-4, paragraphs 99-104.

2.1.12 It must be noted that, whilst Costa Rica ratified the Vienna Convention on 22 November 1996, Nicaragua has not ratified the Convention. In any event it is generally accepted that the provisions of Article 31 of the Vienna Convention represent principles of general international law.

2.1.13 There can be no doubt that the principle of inter-temporal law applies to the interpretation of treaties: see the Judgment of this Court in the *Rights of United States Nationals in Morocco, I.C.J. Reports*, 1952, p.176 at page 189; and Jennings and Watts, *op cit.* pages 1281-82. In this context there is a presumption that the general principles of Treaty interpretation, familiar to the practitioners of today, also formed part of the law applicable in 1858. Whilst the principle of inter-temporal law may be applied with some flexibility in certain contexts, this approach is clearly not appropriate in the case of boundary treaties.

2.1.14 The significance of the object and purpose of a Treaty as an element in the negotiation process has an appreciable seniority, which is reflected in the legal sources. Thus Professor Rousseau described the position in his treatise (in 1970):

> "La doctrine s'est généralement borné à recommander la 'prise en considération des buts du traité' en tant que moyen légitime d'interprétation (résolution précitée de l'Institut de droit international adoptée le 19 avril 1956), formule qui se retrouve dans plusieurs sentences arbitrales (sentence du surarbitre Gray en date du 8 avril 1858 dans l'affaire des *pêcheries réserves* entre les Etats-Unis et la Grande-Bretagne, interprétation de l'Article 1er du traité du 5 juin 1854, *R.A.I.*, tome II, p.447; sentence arbitrale Unden du 4 novembre 1931 entre la Bulgarie et la Grèce dans l'affaire des *forêts du Rhodope*, interprétation de l'Article

> 181, paragraphe 3 du traité de Neuilly, *R.S.A.*, vol. III, p.1403; sentence arbitrale René Cassin du 10 juin 1955, entre la Grande-Bretagne et la Grèce dans l'affaire des *cargaisons déroutées, interprétation* de l'accord financier anglo-hellénique du 11 février 1942, *R.S.A.*, vol. XII, p. 70)."[126]

2.1.15 Thus the precedents cited by Rousseau go back as far as the Arbitral Award of 1858 in the case of the *Reserved Fisheries* between the United States and Great Britain, de la Pradelle and Politis, *Recueil des Arbitrages Internationaux*, II, p. 440, at page 447.

2.1.16 The significance of the object lying behind the express provisions of the Treaty is given emphasis in leading Latin-American authorities published in the same era as the Treaty of 1858. Thus, in his work published in 1868, the Argentinean jurist Carlos Calvo stated the position as follows:

> "Passing, then, to expound the particular rules, it is expressed in these terms, by enumerating the most important:
>
> First. In all obscure passages, the object ought to be to discover the thoughts of the author, from which it results that on occasion we should take the expressions in their general sense and others in their particular sense according to the cases."[127]

2.1.17 The classical work by Andres Bello expresses an identical opinion in the fourth edition published in Paris in 1882:

> "Passing to the particular rules that are deduced from these axioms, I merely give a bare catalogue of them, and

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[126] *Droit International Public* ,Vol. I, p.272, para 241.

[127] *Derecho Internacional Teórico y Práctico*, Second Volume, Paris, 1868, para. 818.

> referring, with respect to their illustrations, to Vattel, 1.II, Chapter 17.
>
> 1. In all obscure passages, the object ought to be to discover the thoughts of the author, from which it results that we should take some expressions in their particular sense and others in a general sense, according to the cases."[128]

2.1.18 The first edition of Bello was published in 1832. The fourth edition, quoted above, was also prepared by the author.

C. THE PERTINENT PRINCIPLES OF TREATY INTERPRETATION: THE DUTY TO CONSTRUE A TREATY AS A WHOLE

2.1.19 The standard authorities formulate a principle which is a logical corollary of the reference to the object and purpose of a treaty. The principle is stated in the form of a duty to construe a treaty as a whole and not to focus attention upon any of its provisions in isolation. This principle is stated in McNair, *Law of Treaties*, 1961, page 382. As the editors of *Oppenheim* point out, the principle requiring reference to the context is another form of the duty to construe a treaty as a whole: Jennings and Watts, *Oppenheim's International Law*, Volume 1, 9th edition, page 1273. The significance of the context is also emphasised by Rousseau, *Droit International Public*, Volume I, pages 284-85, paragraph 248.

2.1.20 Sir Gerald Fitzmaurice formulates what is essentially the same principle as 'the principle of integration', namely, that 'treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes, and principles: see Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Volume I, page 50 (and see also pages 59-61).

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[128] *Principios de Derecho Internacional*, 4th Edition, 1882, pp. 135-6. See also the second edition published in Valparaiso, 1844, p. 114.

D. THE EVIDENCE OF THE OBJECT AND PURPOSE OF THE TREATY OF 1858

2.1.21 The evidence of the object and purpose of the Treaty of 1858 will now be presented as fully as possible, and within convenient categories.

1. The Negotiating History

2.1.22 The negotiating history affirms that the issues between Costa Rica and Nicaragua were related to disputed territory and boundaries. The negotiating history is described in some detail in the Rives Report dated 2 March 1888[129] during the Arbitration procedure of President Cleveland. The report is as follows:

> "I now proceed to state the history of the negotiations which resulted in the Treaty in question, and of the executive and legislative acts which are relied on by Costa Rica as constituting a sufficient ratification.
>
> The long and bitter struggle in which Nicaragua and other Central American States had been involved, and of which the part played by Walker and the filibusters was the most notorious incident, came to an end in 1857. The Republic of Costa Rica had taken part in that struggle, and her case

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[129] President Cleveland empowered Mr. George L. Rives, Assistant Secretary of State, to examine the arguments and evidence submitted by the two sides and to prepare a report to the President upon which a decision in the case might be based. The instrument by which President Cleveland delegated this authority to George L. Rives is reproduced in J.B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, Vol. 2, p. 1945, note 2, U.S. Government Printing Office, Washington, DC., 1898. Mr. Rives communicated a copy of the President's order to Costa Rica and Nicaragua on the day it was made. For. Rel. 1888, part I, pp. 455-456.

states as a fact that at the close of the contest the Costa Rican troops held military positions on both sides of the San Juan. The argument of Nicaragua seems to imply that such possession was not taken until after the close of the war; but the fact itself is not in dispute. It was regarded by Nicaragua at the time, as constituting a *casus belli*; and Costa Rica having failed to withdraw her troops, war was declared by Nicaragua on the 25th November, 1857,- although negotiations for a settlement of the difficulty still continued, but without success.

In this posture of affairs the Republic of San Salvador offered mediation through its Minister Colonel Don Pedro Rómulo Negrete. Owing principally, as it would seem, to Colonel Negrete's earnest efforts, the opposing Governments appointed Ministers Plenipotentiary, who met with the Salvadorian Minister at San José de Costa Rica, and there concluded the Treaty of Limits,- the validity of which is now under examination.

By that instrument, the boundary line is made to begin at Punta de Castilla, at the mouth of the San Juan River; thence it follows the right or Southern bank of that stream to a point 3 miles below the Castillo Viejo; thence it runs along the circumference of a circle drawn round the outworks of the Castle as a center, with a radius of three miles, to a point on the Western side of the Castle, distant two miles from the River; thence parallel to the San Juan and the Lake, at distance of 2 miles therefrom to the Sapoá River; and thence in a straight line to the center of Salinas Bay on the Pacific Ocean. The Treaty further provides that surveys shall be made to locate the boundary; that the Bay of San Juan del Norte and Salinas Bay shall be common to both Republics; and that Nicaragua shall have, exclusively, dominion and supreme control of the waters of the San Juan – Costa Rica having the right of free navigation for the purposes of commerce in that part of the River on which she is bounded. It was further agreed that in the event of war between Costa Rica and Nicaragua, no act of hostility was to be practiced in the Port of the River of San Juan, or on the Lake of Nicaragua; and the observance of this article of the Treaty was guaranteed by the Republic of San Salvador.

It is admitted by the parties to the present arbitration that the Treaty was duly ratified by Costa Rica on the 16th April, 1858; and that it was not ratified at all by San Salvador. It is further established that there was some ratification by representatives of Nicaragua – but whether or not such ratification was sufficient is one of the points now in controversy, and it is therefore necessary to examine fully the powers and the proceedings of the Nicaraguan authorities.

The Republic of Nicaragua, as appears from the evidence, was a Constitutional Government of limited powers, which were defined by a written Constitution. Nicaragua, as one of the States of the Central American Republic, adopted her first Constitution on the 8th April, 1826. Upon the dissolution of the Federal Republic she assumed the rank of an independent nation; and in 1838 adopted a new Constitution, which her representatives now contend was in full force and vigor at the time of the execution of the Treaty of Limits. The full text of the Nicaraguan Constitution of 1838 is not contained in the arguments which have been laid before the Arbitrator; but it sufficiently appears that power was vested in an elective President and a Congress. It also appears that by Article 2 (cited in full below), the boundaries of the State were defined; and that by Article 194, quoted in the argument of Nicaragua, a complicated method of amendment was provided, of which the only feature now necessary to notice is that no proposed amendment shall take effect until it has been approved by two successive Legislatures.

In 1857 the necessity for a complete revision of the Constitution of 1838 seems to have been generally recognized. The long and exhausting conflicts which had been waged from 1854 to 1857, and the existence, during the greater part of that time, of two hostile governments, each claiming to exercise constitutional and supreme power throughout the country, had demonstrated, to the satisfaction of the inhabitants, the importance of changes in the organic law. Accordingly a Constituent Assembly, with ample powers, was duly elected. The due election, and the full constituent powers of this body, are facts not disputed in the arguments now submitted on behalf of Nicaragua.

In November, 1857, the Constituent Assembly met, and addressed itself at once to the task of framing a new Constitution for Nicaragua, as well as of legislating upon the ordinary affairs of the nation.

On the 18th of January, 1858, the previous negotiation with Costa Rica having failed, the Assembly ordered new Commissioners to be appointed to negotiate treaties of peace, limits, friendship, and alliance between Nicaragua and Costa Rica.

On the 5th February, 1858, a further and supplemental decree on the same subject, was adopted, which is as follows:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative faculties with which it is invested, decrees:

Article 1. For the purpose that the Executive may comply with the decree of January 18 instant, the said Executive is hereby amply authorized to act in the settlement of the difficulties with Costa Rica in such manner as it may deem best for the interest of both countries, and for the independence of Central America, without the necessity of ratification by the legislative power.

Article 2. Such treaties of limits as it may adjust shall be final, if adjusted in accordance with the bases which separately will be given to it; but, if not, they shall be subject to the ratification of the Assembly.

What were the separate bases of negotiation given to the Nicaraguan Executive does not appear from any of the documents submitted to the Arbitrator. But it is not distinctly asserted by the representatives of Nicaragua that such instructions were disregarded in the negotiation of the

Treaty.- the arguments relied on to prove its invalidity resting upon entirely different grounds, which will be stated hereafter.

On the 15th April, 1858, the Treaty of Limits was signed by the Plenipotentiaries of Costa Rica, Nicaragua and San Salvador; and on the 26th April, 1858, ratifications were personally exchanged by the Presidents of Costa Rica and Nicaragua, who met for the purpose on Nicaraguan territory at the City of Rivas. The Treaty had not then been passed upon by the Assembly, the decree of ratification being by the President alone. It is as follows:

TOMAS MARTINEZ, the President of the Republic of Nicaragua:

Whereas General Máximo Jerez, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the Republic of Costa Rica, has adjusted, agreed upon and signed, on the 15th instant, a Treaty of Limits, fully in accordance with the bases which, for that purpose, were transmitted to him by way of instructions; finding that said Treaty is conducive to the peace and prosperity of the two countries, and reciprocally useful to both of them, and that it facilitates, by removing all obstacles that might prevent it, the mutual alliance of both countries, and their unity of action against all attempts of foreign conquest; considering that the Executive has been duly and completely authorized by legislative decree of February 26th ultimo to do everything conducive to secure the safety and independence of the Republic; and by virtue, furthermore, of the reservation of faculties spoken of in the Executive decree of the 17th instant:

Does hereby ratify each and all of the articles of the Treaty of Limits, made and concluded by Don José Maria Cañas, Minister Plenipotentiary of the Government of Costa Rica, and Don Maximo Jerez, Minister Plenipotentiary of the Supreme Government of Nicaragua, signed by them on the 15th instant and ratified by the Costa Rican Government on the 16th. And the additional act of the same date is likewise ratified.

On the 28th May, 1858, thirty-two days after the ratification, and forty-three days after the signature of the Treaty of Limits, the following decree was passed by the Constituent Assembly:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative powers vested in it, decrees:

Sole Article. The Treaty of Limits concluded at San José on the 15th of April, instant, between General Don Máximo Jerez, Minister Plenipotentiary from this Republic, and General Don Jose Maria Cañas, Minister Plenipotentiary from the Republic of Costa Rica, with the intervention of Colonel Don Pedro Rómulo Negrete, Minister Plenipotentiary from Salvador, is hereby approved."

On the 19th August, 1858, the Constituent Assembly adopted the new Constitution, of which it is only needful to cite the first Article, viz:

The Republic of Nicaragua is the same which was, in ancient times, called the Province of Nicaragua, and, after the independence, State of Nicaragua. Its territory is bounded on the East and Northeast by the Sea of the Antilles; on the North and Northwest by the State of Honduras; on the West and South by the Pacific Ocean; and on the Southeast by the Republic of Costa Rica. The laws on special limits form part of the Constitution."[130]

2.1.23 This source has been presented in full and without summary. It constitutes a significant and reliable account of the negotiating history, prepared by an official of a third State in the context of a major arbitration. As appears from the Rives Report, the background included a war declared by Nicaragua on 25 November 1857.

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[130] NCM, Annex 70, Rives Report at pp. 462-4, dated 2 March 1888.

2. The Reflection of the Dispute Relating to Nicoya in the Diplomatic History

2.1.24 Both during the existence of the Federal Republic of Central America, and following its dissolution in 1838, the question of boundaries acquired greater importance. The position is described as follows in the Rives Report:

> "But with the establishment of the Federal Republic, and still more, with the dissolution, the questions of boundary began to assume importance.
>
> The Federal Constitution seems to have provided by its Article VII for the demarcation of each State; but nevertheless nothing was done towards the establishment of the line between Costa Rica and Nicaragua.
>
> In 1838 Costa Rica seems to have urged upon Nicaragua – then assuming the rank of an independent State upon her withdrawal from the Federation – a desire for a recognition of the annexation of Nicoya. In 1846, 1848 and 1852 other fruitless negotiations were undertaken with a view to settling the boundary; and in 1858, when the Treaty of Limits was signed, the question, in one form or another, had been before the two Governments for at least twenty years.
>
> That the documentary evidence was slight and unsatisfactory, has been already shown; and that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guaranties' of the 8th March, 1841- which asserts as the boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua, and the River San Juan."[131]

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[131] NCM, Annex 70.

2.1.25 The conclusion of the Treaty of 1858 was prefigured by several treaties concerning dispute settlement which remained unratified. One such instrument was the Preliminary Treaty (Marcoleta – Molina), signed on 28 January 1854. The first two Articles provide as follows:

> "Article 1
>
> The Governments of the Republics of Nicaragua and Costa Rica mutually commit themselves to putting an end as soon as possible to the differences that unfortunately have arisen and still exist between said Republics, regarding sovereignty of certain territories and certain inland navigation rights, either through a direct compromise between the two interested parties, without third-party intervention, or by submitting themselves to the decision made by a friendly Power.
>
> Article 2
>
> In case the currently pending negotiations in San José, between the Government of Costa Rica and the Nicaraguan Plenipotentiary, do not unfortunately have the effect intended by both parties, it is hereby provided that immediately after exchanging ratifications of this Convention, the Republics of Nicaragua and Costa Rica shall submit the decision on each and every pending issue between the two Governments, with respect to borders, inland navigation, and sovereignty of whichever disputed territories, rivers, and lakes, without any reserve, to the arbitration award of His Majesty the French Emperor, or of any other Government which any of the contracting parties deem it convenient to designate upon exchanging ratifications of this Convention."[132]

2.1.26 Another instrument is the Juarez – Cañas Treaty signed on 6 July 1857. This remained unratified but the content indicates the general intention to establish a basis for peaceful and stable relations. The preamble and the first two provisions of the English text read as follows:

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[132] Marcoleta – Molina Preliminary Treaty, 28 January 1854; NCM, Annex 4.

> "Gregorio Juárez and José Maria Cañas, special Commissioners; the first for the Supreme Government of Nicaragua, and the second for Costa Rica, to enter into a definite border treaty which divides both Republics and ends the disputes that until now have stalled the good understanding that should reign between them, for their mutual safety and exaltation; having exchanged our respective powers, which we found to be in good and due form, we have agreed on the following:
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> First: The Government of Nicaragua, as a sign of gratitude for the Government of Costa Rica, for its good offices on behalf of the Republic, for the solid determination and great sacrifices made for the cause of national independence, waives, takes and puts away every right on the District of Guanacaste, which is now called the Province of Moracia of the Republic of Costa Rica, to be understood, held, and acknowledged, from now and forever, as an integral part of said Republic, under the sovereign jurisdiction of said Government.
>
> Second: As that Province of Moracia is located between the San Juan del Norte River and the South Sea, both parties agree that the border should be an imaginary line, drawn from a point in the middle of the Golfo de Salinas de Bolaños in the South Sea, up to a point below Castillo Viejo, that will be marked two English miles from the outside fortifications of said castle, downstream of the river, up to the aforementioned point; and whilst this one is made, Raudal del Mico, across the river known as Bartola, will be taken as a natural border marker on that side; and following the margin and the shore of said river, the same dividing line will follow down, until it reaches Punta de Castilla."[133]

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[133] Juarez – Cañas Treaty, 6 July 1857, CRM, Vol. 2, Annex 5.

2.1.27 This agreement would have constituted a definitive boundary, had it been ratified. The first provision makes a clear renunciation of any claim to the District of Guanacaste. The agreement clearly recognizes that the River San Juan is entirely within Nicaragua.

3. The Conclusion of the Treaty of 15 April 1858

2.1.28 In the wake of the previous failures to adopt an agreed settlement in January 1858 the National Assembly of Nicaragua ordered new commissioners to be appointed to negotiate treaties of peace, limits, friendship and alliance, between Costa Rica and Nicaragua. A further Decree on the same subject was adopted on 5 February 1858. The new Treaty was signed on 15 April 1858. The text will now be reviewed in order to elucidate its object and purpose.

(a) The Title

2.1.29 The original title of the Treaty of 1858 is 'Tratado de Limites entre Costa Rica y Nicaragua'. The title thus speaks for itself.

(b) Preamble

2.1.30 The principle of integration and the reference to the text of a Treaty as a whole necessarily involves taking account of the preamble. In the *Beagle Channel Arbitration* the Court observed:

> "Although Preambles to treaties do not usually – nor are they intended to – contain provisions or dispositions of substance – (in short they are not operative clauses) – it is

> nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to 'situate' it in respect of its object and purpose. As the Vienna Convention says (Article 31, paragraph 2),
>
> > 'The context for the purpose of the interpretation of a Treaty shall comprise, in addition to its text, *including its* preamble and annexes ...."[134] (emphasis added)

2.1.31 The preamble to the Treaty of 1858 indicates very clearly the character of the agreement as dealing with the peaceful resolution of questions concerning boundaries. The instructions to the negotiators were 'to conclude a Treaty on the boundaries of the two Republics ...'

(c) The Text of the Treaty

2.1.32 The first seven Articles of the Treaty, that is to say, its main substance, relate either to the fixing of the boundary line, or to the question of the procedure of future demarcation, or to the legal status of particular locations. Article IV concerns the legal status of the Bay of San Juan del Norte and Punta Castilla.

2.1.33 In this context Article VI forms part of the overall territorial settlement and resolution of the differences which resulted in a war in 1857. The primary provision concerns 'the exclusive dominion and sovereignty' accorded to Nicaragua over the waters of the River San Juan.

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[134] International Law Reports, Vol. 52, p.93 at p.132, para. 19.

2.1.34 The provisions of Article VII are also significant:

> "It is agreed that the territorial division made by this treaty shall in wise be understood as counteracting obligations subscribed to, whether under political treaties or under contracts for a canal (*canalizacion*) or transit made on the part of Nicaragua before this present agreement, it shall rather be understood that Costa Rica assumes those obligations in the tract (*parte*) belonging to her territory without in any way interfering with the eminent domain and sovereign rights held by her over the same."[135]

2.1.35 This provision describes the object and purpose of the Treaty as a whole very well in its reference to the 'territorial division made by this Treaty…'

(d) Diplomatic Correspondence Subsequent to the Treaty of 1858

2.1.36 The diplomatic correspondence reflects the general character of the Treaty of 1858 as a Treaty of peace and boundaries. Thus, on 6 May 1858, the Legation of El Salvador, which had acted as mediator, wrote to the Governments of Nicaragua and Costa Rica in the following terms:

> "Having been signed at San Jose, Costa Rica, the important treaty of peace and limits between this and that Republic, which was concluded in the city of Rivas on April 26th last, according to the act of exchange of that date, the undersigned Plenipotentiary of El Salvador has the pleasure to inform you that he has just arrived to this Court to cordially greet the Government of Nicaragua, and to *congratulate it for the conclusion of the serious questions that existed with Costa Rica* and to announce the withdrawal of this Legation to the capital of El Salvador to inform its Government *of the successful result achieved by*

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[135] CRM, Vol. 2, Annex 7, pp. 54-60.

> *the undersigned Minister of that Republic in those of Nicaragua and Costa Rica*. In saying farewell, I am very pleased to state in this note that my heart vehemently wishes that the present social wellbeing of the Nicaraguans, the internal and external policy of its Government, and its well-founded hopes for improvement in all senses shall consolidate each day more and more and shall soon become a reality."[136](Italics in the original, underline added)

2.1.37 The generosity of the territorial arrangements exhibited by Nicaragua attracted comment from third States. Mirabeau B. Lamar, United States Resident Minister to the Governments of Costa Rica and Nicaragua, wrote to the Secretary of State on 28 May 1858, commenting on the Treaty of 15 April 1858:

> "You will find in the *Gazette* a Treaty of Limits between the two Republics, by which it appears that Nicaragua has conceded all that Costa Rica demanded and probably more than she ever expected to obtain."[137]

2.1.38 By the year 1870 the Nicaraguan Government started to raise the question of the validity of the 1858 Treaty, and asserted that its provisions were incompatible with the Constitution of Nicaragua. The relevant correspondence includes the following items:

i) Nicaragua to Costa Rica, 1 February 1871[138]. In this Note Nicaragua complains of the loss of Guanacaste as a consequence of the Treaty of 1858.

ii) Costa Rica to Nicaragua, 22 July 1872.[139] This substantial document sets forth arguments relating to the boundaries of Nicoya

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[136] NCM, Annex 24.
[137] NCM, Annex 25. See also Manning, Doc. 1436, pp.676-8
[138] CRM, Vol. 3, Annex 30.

(Guanacaste), and the claim of Costa Rica to title. And it is pointed out that the Treaty of 1858 confirmed that Nicoya was an integral part of Costa Rica.

iii) Message of the State Department of Nicaragua to the Senate of Nicaragua on 8 January 1876,[140] giving the history of the boundary question with Costa Rica and the invalidity of the 1858 Treaty.

2.1.39 The correspondence on this theme persisted until the two States agreed to the arbitration of President Cleveland in 1888. Two letters from the year 1888 are fairly typical of the milieu. The immediate subject of discussion was the legality of the presence on the San Juan of a Costa Rican steamship: see the Note of Nicaragua to Costa Rica, dated 3 August 1886[141] and the response of Costa Rica, dated 31 August 1886[142].

2.1.40 In any event, soon after the exchange of Notes in August, on 24 December 1886 the two States concluded a Convention to submit the question of the validity of the Treaty of 1858 to the arbitration of the Government of the United States[143].

(e) The Cleveland Award of 22 March 1888 and the Report to the Arbitrator by George L. Rives, Assistant Secretary of State, of 2 March 1888

2.1.41 The Cleveland Award of 22 March 1888[144] was concerned with the issue of the validity of the Treaty of 1858 and certain other specific questions

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[139] NCM, Annex 26.
[140] NCM, Annex 27.
[141] CRM, Vol. 3, Annex 32.
[142] CRM, Vol. 3, Annex 34.
[143] NCM Annex 11.
[144] CRM, Vol. 2, Annex 16.

indicated in the Convention on submission of these issues to arbitration dated 24 December 1886. The text of the Arbitral Award is economical and it is necessary to examine the Report to the Arbitrator prepared in the Department of State in order to appreciate the conclusions more fully. The Report was prepared by George L Rives, the Assistant Secretary of State, and is dated 2 March 1888. The Report of Rives is printed in the *Papers Relating to the Foreign Relations of the United States*, 1888, Part I, as the enclosure to the Award of the Arbitrator (which is Doc. 314 at page 456)[145]. The Award is included in the Costa Rican *Memorial*, Volume 2 at pages 97 to 100, but the enclosure, that is to say, the Rives Report, is not included.

2.1.42 The Rives *Report* has been quoted earlier in this Chapter. It gives a detailed account of the historical background of the Treaty of 1858. The *Report* elaborates the prominence of territorial claims: see the quotations above, paragraphs 2.1.22 to 2.1.24.

(f) The First Award by the Umpire E.P. Alexander of 30 September 1897

2.1.43 This Award was rendered in accordance with the Matus-Pacheco Agreement, concluded on 27 March 1896, relating to the process of demarcation called for by the Cleveland Award. The Agreement appears in the Costa Rica *Memorial*, Volume 2, Annex 17.

2.1.44 The views of the learned Umpire on the interpretation of the Treaty of 1858 are of relevance for present purposes. As can be seen, the Umpire

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[145] NCM, Annex 70.

was seeking to identify the object and purpose of the Treaty of 1858. In his words:

> "The conclusion at which I have arrived and the award I am about to make do not accord with the views of either commission. So, in deference to the very excellent and earnest arguments so faithfully and loyally urged by each commission for its respective side, I will indicate briefly my line of thought and the considerations which have seemed to me to be paramount in determining the question; and of these considerations the principal and the controlling one is that we are to interpret and give effect to the Treaty of April 15, 1858, in the way in which it was mutually understood at the time by its makers.
>
> Each commission has presented an elaborate and well argued contention that the language of the treaty is consistent with its claims for a location of the initial point of the boundary line at a place which would give to its country great advantages. The points are over six miles apart, and are indicated on the map accompanying this award.
>
> The Costa Rican claim is located on the left-hand shore or west headland of the harbor; the Nicaraguan on east headland of the mouth of the Taura branch.
>
> Without attempting to reply in detail to every argument advanced by either side in support of his respective claim, all will be met and sufficiently answered by showing that those who made the treaty mutually understood and had in view another point, to wit, the eastern headland at the mouth of the harbor.
>
> It is the meaning of the men who framed the treaty which we are to seek, rather than some possible meaning which can be forced upon isolated words of sentences. And this meaning of the men seems to me abundantly plain and obvious.

This treaty was not made hastily or carelessly. Each State had been wrought up by years of fruitless negotiations to a state of readiness for war in defense of what it considered its rights, as is set forth in Article 1. In fact, war had actually been declared by Nicaragua on November 25, 1857, when, through the mediation of the Republic of Salvador, a final effort to avert it was made, another convention was held, and this treaty resulted. Now, we may arrive at the mutual understanding finally reached by its framers by first seeking in the treaty as a whole for the general idea or scheme or compromise upon which they were able to agree. Next, we must see that this general idea of the treaty as a whole harmonizes fully with any description of the line given in detail, and the proper names of all the localities used, or not used, in connection therewith, for the non use of some names may be as significant as the use of others. Now, from the general consideration of the treaty as a whole, the scheme of compromise stands out clear and simple.

Costa Rica was to have as a boundary line the right or southeast bank of the river, considered as an outlet for commerce, from a point 3 miles below Castillo to the sea.

Nicaragua was to have her prized *sumo imperio* of all the waters of this same outlet for commerce, also unbroken to the sea.

It is to be noted that this division implied also, of course, the ownership by Nicaragua of all islands in the river and of the left or northwest bank and headland.

This division brings the boundary line (supposed it to be traced downward along the right bank from the point near Castillo) across both the Colorado and the Taura branches.

It can not follow either of them, for neither is an outlet for commerce, as neither has a harbor at its mouth.

It must follow the remaining branch, the one called the Lower San Juan, through its harbor and into the sea.

> The natural terminus of that line is the right-hand headland of the harbor mouth.
>
> Next let us note the language of description used in the treaty telling whence the line is to start and how it is to run, leaving out for the moment the proper name applied to the initial point. It is to start at the mouth of the river San Juan de Nicaragua, and shall continue following the right bank of the said river to a point three English miles from Castillo Viejo.
>
> This language is evidently carefully considered and precise, and there is but one starting point possible for such a line, and that is at the right headland of the bay.
>
> Lastly, we come to the proper name applied to the starting point, 'the extremity of Punta de Castillo'. This name Punta de Castillo does not appear upon a single one of all the original maps of the bay of San Juan which have been presented by either side, and which seem to include all that were ever published before the treaty or since. This is a significant fact, and its meaning is obvious. Punta de Castillo must have been, and must have remained, a point of no importance, political or commercial, otherwise it could not possibly have so utterly escaped note or mention upon the maps. This agrees entirely with the characteristics of the mainland and the headland on the right of the bay (emphasis added).[146]

2.1.45 As can be seen the in the underlined sections in the previous paragraph, the Umpire focuses upon the existence of 'a scheme of compromise' and the establishment of a division.

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[146] CRM, Vol.2, Annex 18, Text of First Award.

E. THE EVIDENCE OF THE OBJECT AND PURPOSE O. THE TREATY OF 1858: THE LEGAL CONSEQUENCES

2.1.46 Having set forth the substantial evidence available of the object and purpose of the Treaty of 1858, it is necessary to assess the legal implications of this material for the process of interpretation.

2.1.47 The position of Costa Rica is that Costa Rican vessels must be permitted to navigate the Rio San Juan 'sin ninguna condicion' ("without any condition"), and that, in consequence, Nicaragua may not exercise *any* rights of sovereignty and jurisdiction.[147]

2.1.48 This position is difficult to justify in terms of international law. Two sets of considerations support the view that Nicaragua has a regulatory power in respect of Costa Rican vessels exercising 'los derechos perpetuos de libre navegacion' ('the perpetual rights of free navigation') in accordance with Article VI of the Treaty of 1858. The first set of considerations derives from the textual interpretation of the Treaty. The right of free navigation is referred to subsequent to, and as a qualification of, the recognition of the full sovereignty of the Republic of Nicaragua over the waters of the Rio San Juan. Although the term 'soberania' is not employed, the words which do appear in the text – 'exclusivamente el dominio y sumo imperio' – constitute a comprehensive and affirmative formulation which connotes full title or sovereignty to the river together with the plenary jurisdiction which such title or sovereignty connotes. The right of free navigation appears as a *qualification* of the sovereignty of Nicaragua and is introduced by the term 'pero' (but). Thus a *particular* right of Costa Rica is presented as a qualification of the *general* grant of rights (in the form of title (dominio) and sovereignty ('sumo imperio') to Nicaragua. The term 'sumo imperio' is as strong as the term 'soberanía' and the result is the establishment of a boundary; and thus Article VII refers to 'la division territorial'. The principal object of the Treaty was to establish a *boundary*, hence it is entitled 'Tratado de Limites'.

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[147] See CRM,Vol. 3, Annex 45, the Costa Rica Note dated 19 August 1982.

2.1.49 Thus the right of Costa Rica is a specific right in respect of territory under the sovereignty of Nicaragua. The right of free navigation is not an absolute right and, apart from the evidence from the text of Article VI, there is a second set of considerations which supports the view that Nicaragua has a regulatory power in respect of Costa Rican vessels.

2.1.50 Considerations of ordinary logic and good sense require that the right of free navigation be articulated by reference to two other elements. The first such element is political and legal: it is the fact that the right of navigation occurs within the territory of another State and the balancing of the two rights excludes the idea that the right of navigation is in some sense absolute or peremptory. The right of navigation must be exercised by reference to the legitimate interests of the territorial sovereign. The second element pertinent to the right of navigation can only be guaranteed if the territorial sovereign is permitted to make the arrangements to maintain the physical and other conditions necessary for navigation. For it is only the territorial sovereign which can make provision for the safety of navigation, the buoying of channels, and the maintenance of public order. It is difficult to envisage, at the functional level, a regime of 'free navigation' in the absence of such conditions of safety and security.

2.1.51 There is a further important consideration arising from the fact that Article VI does not provide for 'free navigation' *tout court*, but only 'for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos River, the Sarapiqui, or any other way, proceeding from the bank of the San Juan River.' Thus the right of free navigation is articulated in the form of a careful statement of purposes. Indeed, the content of the Cleveland Award of 1888, in its second finding, underlines the special purpose of the right of navigation recognized in Article VI. This part of the Award provides:

> "The Republic of Costa Rica under said Treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[148]

2.1.52 From this premiss two conclusions follow. First, the fact that the right of navigation is subject to careful definition and precise limitation confirms the view that the right is to be exercised in a context of Nicaraguan sovereignty and general jurisdiction. Secondly, Nicaragua must have the power to regulate Costa Rican traffic for the purpose of ensuring that the conditions of the right of navigation laid down in the Treaty are being observed.

2.1.53 The position adopted in the previous paragraphs, according to which Nicaragua has a power of regulation consistent with the provisions of

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[148] CRM, Vol. 2, Annex 16.

Article VI of the Treaty of 1858, is confirmed by the opinion of experts and the practice of States in comparable situations.

2.1.54 Thus the well-known authority of the nineteenth century, Wheaton, makes the following statement of principle:

> "Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called *innocent use.* Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right,* its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise."[149]

2.1.55 It is not suggested that this reasoning is directly applicable to the present case, especially in view of the fact that the right of navigation presently in issue arises from a bilateral Treaty. However, the significant point is presented in the final sentence of the passage which clearly assumes that, when it exists, a right of navigation for commercial purposes is subject to certain conditions as to the mode of its exercise.

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[149] Wheaton, *Elements of International Law*, 1866, Part II, Chapter IV, section 193.

2.1.56 The same point is made by the great classical Latin American jurist, Andres Bello, in the following passage:

> "Passage of foreign vessels through territorial seas is generally seen as a right of innocent use and some nations grant it to others without difficulty.
>
> The same is naturally applicable to rivers and lakes. The difference of circumstances, however, produces some important modifications with respect to rivers, in which passage through foreign waters is usually absolutely essential for the trade of the riparian States. A State that is the owner of the upper part of a navigable river has the right of navigation to the sea, which cannot be hampered by the state that owns the lower part, nor disturbed with regulations and duties that are not necessary for its own security or compensation for the inconvenience caused by the navigation. In 1792, when Spain owned the mouth and both sides of the lower Mississippi, and the United States owned the left side of the upper part of the same river, it was strongly advocated by the United States that the laws of nature and of nations gave them the right to navigate that river up to the sea, only subject to the rules that Spain deemed reasonably necessary for its own security and for the protection of its tax ordinances. The United States also advocated that since the right to an end entails the right to the essential means to achieve that end, the right to navigate the Mississippi entailed the right to anchor or moor on the beach, and even the right to disembark if necessary. The question ended in favor of the United States. Today, however, the owners of the two sides of this river exclusively enjoy the right of navigation."[150]

2.1.57 It is common for modern authorities to recognize that any right of free navigation is subject to 'the necessary regulatory power of the riparian

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[150] Bello, *Derecho Internacional*, 1872 edition, Obras Completas, La Universidad de Chile, Sixth Volume, pp. 95-96, notes omitted.

States': see O'Connell, *International Law*, 2nd ed., London, 1970, Volume I, page 579.

2.1.58 In any case a process of deduction from other Treaty regimes is not a safe guide to the interpretation of the Treaty of 1858 between Nicaragua and Costa Rica. On a reasonable interpretation of that instrument three types of regulation by the Nicaraguan authorities would be compatible with the principle of free navigation, namely:

(a) The right to monitor the character of the vessels exercising the right of navigation in order to restrict the passage of 'vessels of war' [151] in accordance with the Cleveland Award 1888 as well as any vessel not carrying objetos de comercio. Certainly, the passage of any vessel which appeared to be a vessel of war from its external aspect and mode of handling could be challenged.

(b) The application of regulations concerning buoying, lighting and other matters connected with the maintenance of conditions of safe navigation.

(c) The implementation of measures reasonably necessary for the security of the Republic of Nicaragua and the safety of the people living and working in the vicinity of the frontier.

2.1.59 There is authority for the view that a State may exercise a police power in respect of vessels exercising a Treaty-based right of free navigation in rivers within its territory: see the General Claims Commission in *James H. McMahan (U.S.A.) v United Mexican States* (1929), *Reports of International Arbitral Awards*, Volume IV, p.486, at page 490.

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[151] CRM, Vol 2, Annex 16.

2.1.60 **The reasoning of the General Claims Commission has considerable relevance in the present context. In the words of the Decision:**

> **"In view of these provisions, there is no doubt but that McMahan and his companions were exercising a perfectly recognised right in navigating on a part of the Rio Grande which serves as boundary between the two nations.**
>
> **But, on the other hand, it is also necessary to take into account that the same Treaty of 1848 to which reference has been made above, in its Article VII further provides that:**
>
> **"The stipulations contained in the present Article shall not impair the territorial rights of either republic within its established limits."**
>
> **The Treaty of 1853, as has been noted, leaves in force all of Article VII, in so far as it relates to all of that portion of the Rio Grande which under this Treaty was established as a boundary, and, consequently, leaves in force the reservation hereinbefore alluded to.**
>
> **It appears that the reservation expressly made of the territorial rights of either Republic, within the limits which were established, covers the right of exercising the police power, inasmuch as it is one of the rights which the sovereign exercises over its territory. It is pertinent to recall at this point that the boundary or dividing line between both nations in reference to the Rio Grande, is the middle of this river, following the deepest channel, which signifies that up to this point, the two nations may exercise their full territorial rights. But if this alone were not sufficient, by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion**

of the course which corresponds to them. (See Oppenheim, *International Law*, Vol. 1, pp. 314-322, 3rd. Ed. 1920; Fauchille, *Droit International Public*, Vol. 1, 2nd Part. Pp. 453 *et seq.* 8th Ed. 1925; Moore, *International Law Digest*, Vol. 1, pp. 616. *et. seq.;* J. de Louter, *Le Droit International Positif*, Vol. 1, p.445; Oxford Ed. 1920.) The Congress of Vienna of 1815 fixed the free navigation of certain rivers, *subject to police regulations*. Since this date, the restriction appears in nearly all treaties, and has at times been accepted by the United States: Treaty of Washington of May 8, 1871, Article XXVI; Treaty of June 15, 1845, Article 11. It should also be observed that the Institute of International Law in its session at Heidelberg on September 9, 1887, adopted regulations for the navigation of international rivers, applicable to rivers separating two States as well as those traversing several States, in which the right of the riparians to exercise police power over the stream is recognised.

What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty.

Therefore, it does not seem possible to deny that Mexico is entitled to exercise police powers, *some* police powers, at least, over the course of the Rio Grande, and it does not appear excessive or contrary to the right of free navigation, that jurisdictional action of the Mexican authorities, which in one specific occasion and for special causes bearing on its primary right of defense, was intended to ascertain what was being done and what objects were being carried by suspicious individuals who were travelling over deserted places in small crafts."[152]

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[152] Loc.cit., pp.490-91.

2.1.61 The *McMahan* case concerns a Treaty regime establishing the middle of the river as the boundary. The General Claims Commission recognized that up to this point 'the two nations may exercise their full territorial rights', and accepted, as a consequence, that both riparian States had the right to exercise police powers "in that portion of the course that corresponds to them."

2.1.62 In the present case, in the absence of a median line boundary, it is clear that Costa Rica cannot be accorded a general police power over the Rio San Juan. In the Award of President Cleveland, as Arbitrator, the question of the right of navigation of vessels of war was resolved not by recourse to a generalized 'right of free navigation' but to the conditions of navigation specified in the Treaty: that is to say the right of 'free navigation ... *for the purposes of commerce.*' (Article VI). Thus the right of navigation is given a configuration related to the object and purpose of the Treaty of Limits, and not related to a general principle of free navigation. To decide otherwise would be to compromise the territorial settlement which was generous to Costa Rica in certain respects, but recognized the extent of Nicaraguan sovereignty as far as the right bank.

2.1.63 There are certain materials which, whilst not directly relevant, provide support by way of analogy for the proposition that a right, freedom, or liberty, may be subject to a certain degree of regulation by the sovereign of the territory within which the right, freedom, or liberty is to be exercised. Thus, in the *North Atlantic Coast Fisheries* arbitration (1910), the United States claimed that Great Britain had no right to make regulations for a fishery in which American citizens had been granted 'a liberty to take fish of every kind' by a Convention of 1818. The Tribunal (created by a

Special Agreement of 1909) decided that it was lawful for Great Britain to make regulations if they were *bona fide* and not in violation of the Treaty and also if they were: "(1) appropriate or necessary for the protection or preservation of such fisheries, or (2) desirable or necessary on grounds of public order or morals without unnecessarily interfering with the fishery itself; and in both cases equitable and fair as between local and American fishermen ..."[153].

2.1.64 Of considerable interest is the decision of the International Court of Justice in the *Right of Passage* case (Portugal v India)[154]. In that case the Court found that Portugal had, on the basis of a local custom, a right of passage over intervening Indian territory between the enclaves of Dadra and Naga-Aveli and the coastal district of Daman, and between these enclaves, to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the regulation and control of India, in respect of private persons, civil officials and goods in general[155]. Both Portugal and the Court recognized that the passage was subject to the regulation and control of India. Moreover, the Court held that it was within this right of regulation and control for India to refuse passage when there was tension in intervening Indian territory because of political events in the enclaves[156]. Whilst the relevance of this decision is reduced by the fact that the context was a local custom dependent upon the particular practice of the Parties (and of the British authorities as predecessors to India), the general approach of the Court is relevant to the matter at hand.

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[153] Scott, *Hague Court Reports*, New York, 1916, p.,141, at p.171; Wilson, *The Hague Arbitration Cases*, Boston, 1915, p.135 at p.170; Parry (ed.), British Digest of International Law, Vol. 2b, London, 1967, p.585 at p. 594.

[154] *I.C.J. Reports*, 1960, p. 6.

[155] *Ibid.*, pp. 40, 45-46.

[156] *Ibid.*, pp. 44-45.

2.1.65 It has not been the purpose of the present chapter to deal in detail with the precise issues which have arisen between the parties at various times and which was to some extent the subject of the Cleveland Award. However, the general purpose has been to identify the criteria which necessarily arise from the object and purpose of the Treaty of Limits, together with the duty to construe the Treaty as a whole (the principle of integration).

2.1.66 In the result Nicaragua, as the territorial sovereign, must have regulatory powers for the following purposes:'

(a) The protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation; and;

(b) The maintenance of the Treaty provisions prescribing the conditions of navigation in accordance with the Treaty, that is to say, the maintenance of the discipline of the Treaty as such, together with the terms of the Cleveland Award.

CHAPTER 3
THE CLEVELAND AWARD AND OTHER CONSIDERATIONS

Section 3. 1

Interpretation of the 1858 Treaty in the Cleveland Award

A. INTRODUCTION

3.1.1 The rights and obligations of the parties in the present case are governed, first and foremost, by the 1858 Jerez-Cañas Treaty. The Arbitral Award of the President of the United States of America, Grover Cleveland, rendered on March 22, 1888, upheld the validity of the 1858 Treaty and answered other questions put to the arbitrator by the parties. Nicaragua, of course, fully accepts the Cleveland Award. However, the Award did not replace the Treaty, as Costa Rica seems to suggest. In fact, as this Subsection will show, President Cleveland was careful not to depart from the text of the Treaty in his Award. Moreover, an important issue before the Court in this case – the meaning of navigation "*con objetos de comercio*" – was not before the arbitrator and was not addressed in his Award. Especially as to that issue, therefore, it is the 1858 Jerez-Cañas Treaty rather than the Cleveland Award that constitutes the principal determinant of the parties' rights and obligations in this case.

3.1.2 The main reason Costa Rica and Nicaragua went to arbitration was to resolve a dispute between them over the validity of the Jerez-Cañas Treaty of April 15, 1858. This is evident from both the very title of the 1886 Román-Esquivel-Cruz Convention of Arbitration ("Convention…to submit to arbitration…the question in regard to the validity of the treaty of

15 April, 1858"[157]) and the first sentence of the preamble of that agreement, according to which: "The Governments of the Republics of Nicaragua and Costa Rica desiring to terminate the question pending since 1871, viz., whether the Treaty signed by both on the 15th April, 1858, is or is not valid, have named [their respective plenipotentiaries, etc.]…"[158]

3.1.3 Only if the arbitrator found the 1858 Treaty to be valid was he asked to address subsidiary questions, namely: "whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats"; and all "the other points of doubtful interpretation found by either of the Parties in the Treaty…."[159] Nicaragua communicated to Costa Rica eleven "points of doubtful interpretation" that it proposed to submit to the arbitrator while Costa Rica communicated none, finding "nothing in that [the 1858] Treaty which is not perfectly clear and intelligible."[160]

3.1.4 This statement by Costa Rica is especially interesting since, as discussed below, the Treaty says nothing about whether Costa Rica had a right to navigate on the San Juan de Nicaragua River with vessels of war or of the revenue service. If the Treaty was "perfectly clear and intelligible," one might wonder, what ground did Costa Rica have for believing it had a right to navigate in Nicaraguan territory, on the San Juan River, with such vessels?

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[157] NCM, Annex 11, Convention between the Governments of Nicaragua and Costa Rica to submit to the arbitration of the Government of the United States the question in regard to the validity of the treaty of 15 April 1858 (the Román-Esquivel-Cruz Convention of Arbitration), 24 Dec. 1886, see also CRM, Vol. 2, Annex 14.

[158] NCM, Annex 11, preamble.

[159] *Ibid.*, Article 6.

[160] NCM, Annex 70, Arbitration between the Republics of Costa Rica and Nicaragua in relation to the validity of the treaty of 15 April 1858. –Report to the arbitrator, the President of the United States, by George L. Rives, Assistant Secretary of State, U.S. Department of State.

3.1.5 This Subsection will show that the dispute over this question arose out of a unilateral act by Costa Rica in 1886 in clear contravention of the Treaty whereby Costa Rica navigated on the San Juan River with a national steamship to enforce her customs laws. That this is not permitted by the text of the Treaty is clear. President Cleveland, being aware of this, denied Costa Rica any right whatsoever under the Treaty to navigate on the San Juan with vessels of war, and allowed Costa Rica only the most restrictive of rights to navigate on the river with vessels of the revenue service, and even then only under certain conditions, as shown below.

3.1.6 Moreover, of the eleven points of doubtful interpretation raised by Nicaragua[161], none related in any way to Costa Rica's right under Article VI of the 1858 Treaty to navigate on the San Juan River with articles of trade ("*con objetos de comercio*"). This point was simply not regarded by the parties at the time as being in any way "of doubtful interpretation" and was therefore not submitted to the arbitrator for decision.

3.1.7 Thus the Cleveland Award sheds no direct light on the meaning of the phrase, "*con objetos de comercio*". Indeed, if the content and scope of Costa Rica's right to navigate "*con objetos de comercio*" had been at issue, it seems certain that the parties would have paid more attention to the translation of the original Spanish words in their pleadings, as would President Cleveland in his Award. Yet from all that appears, they paid no attention at all to this phrase. Indeed, the translations of the 1858 Treaty prepared by both parties for the Cleveland Arbitration were identical on this point ("for the purposes of commerce"). President Cleveland, for his part, was careful not to prejudice in any way the meaning of the Spanish text, as shown by his enclosing the English translation of the phrase in quotation marks in the *Second* paragraph of his Award[162]. It is thus the 1858 Treaty, not the Cleveland Award, that is controlling on the question of the nature and scope of Costa Rica's right to navigate in Nicaraguan territory, on the San Juan River, "*con objetos de comercio*".

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[161] Note from the Minister of Foreign Affairs of Nicaragua Fernando Guzmán to Minister of Foreign Affairs of Costa Rica, 22 June 1887. CRM, Vol. 3, Annex 36.

3.1.8 On the other hand, some indication of what the parties, and the arbitrator, must have assumed was meant by the phrase "*con objetos de comercio*" – or even "for the purposes of commerce" – is provided by the arbitrator's treatment of a related question: whether and to what extent Costa Rica had the right of navigation on the San Juan River with vessels of the "revenue service".

3.1.9 This Subsection will show that the meaning of the phrase "*con objetos de comercio*" was not before President Cleveland; that President Cleveland in his Award was in fact careful not to express any view regarding the meaning of navigation "*con objetos de comercio*"; that it is the 1858 Treaty that determines the rights and obligations of the parties on that question in the present case; that the Treaty makes no reference to vessels of the revenue service; that it is clear from the Award and from the arbitrator's rejection of broader rights of navigation that any right of Costa Rica to navigate with such vessels in Nicaraguan territory, on the San Juan River, arises only in respect of articles of commerce and only when necessary; and that no armed navigation by Costa Rican vessels, or exercises of jurisdiction by them, is permitted by the Treaty on the San Juan River without the prior authorization of Nicaragua.

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[162] CRM, Vol. 2, Annex 16.

3.1.10 Before proceeding to these points, however, it is worth recalling that like Nicaragua, Costa Rica has always recognized the Cleveland Award as definitive, binding and final.

1. Costa Rica's Recognition of the Cleveland Award as Definitive, Binding and Final

3.1.11 Both Nicaragua and Costa Rica have always recognized that the Cleveland Award interprets the 1858 Treaty in a definitive, binding and final manner. This is reflected in various bilateral instruments as well as in statements of representatives of the two Governments.

3.1.12 The Government of Costa Rica, in particular, has constantly recognized the Cleveland Award as having this character. The Minister of Foreign Affairs of Costa Rica stated at the time of the Award that:

> **"…my Government desires nothing more earnestly than to remove any reason that could serve as an opportunity for new discussions between this and that sister Republic, now that the old ones have happily ended with the award of the President of the United States."[163]**

3.1.13 Subsequent Notes reflect the same recognition on the part of Costa Rica. Thus, in a note to the Nicaraguan Foreign Minister of 9 August 1895, the Minister of Foreign Affairs of Costa Rica, referring to the boundary line dispute, reaffirms Costa Rica's recognition of the finality of the Award in his observation that:

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[163] Note from the Minister of Foreign Affairs of Costa Rica to the Minister of Foreign Affairs of Nicaragua, 25 September 1888; NCM, Annex 36.

> **"Otherwise, the great efforts of both Republics to put an end to their disputes would be worthless, thereby undermining the incontestable authority of the Award and offending the dignity of the Arbitrator, who, opportunely and with such high spirit of conciliation, gladly responded to our common call and put himself at the service of peace…"[164]**

3.1.14 More recently, the President of Costa Rica, in a Note to the President of Nicaragua of 29 July 2000, stated that:

> **"a) the sovereignty over the entire course of the San Juan River corresponds to Nicaragua; b) that in accordance with the Cleveland award of 1888, which constitutes *an obligatory interpretation of the Cañas-Jerez treaty of limits of 1858...*" (Emphasis added)[165]**

3.1.15 Costa Rica's recognition of the binding and final nature of the Cleveland award is also reflected in an important official document of the Ministry of Foreign Affairs, the Yearbook, in 1888, which states:

> **"The President of the United States has proven himself worthy of the gratitude of Costa Rica and Nicaragua by accepting the duty that these have entrusted to his erudition and highest respectability; and for having put an end, with his illustrious decision, to the sole motive for disagreement that separated these two countries." [166]**

3.1.16 President Cleveland's Arbitral Award definitively settled the questions regarding the interpretation of the 1858 treaty, in particular, all questions that existed then. By necessary implication, therefore, there were no other questions that created doubts for the parties in the Treaty. As regards the

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[164] NCM, Annex 37, Note of 9 August 1895.

[165] CRM, Vol. 3, Annex 66.

[166] NCM, Annex 75. Yearbook of the Secretary to Foreign Affairs of Costa Rica. 1888. pp. 3-4.

juridical situation, as Costa Rican President Miguel Angel Rodriguez recognized in the Note of 29 July 2000 mentioned above that it is worth noting that "...c) that *since 1888 nothing has occurred to change this legal status*..." (Emphasis added)[167]

3.1.17 Costa Rica, however, after constantly and repeatedly recognizing the definitive, final and binding character of the 1888 Arbitral Award with respect to the interpretation of the 1858 Treaty, has effectively modified her juridical position, as can be noted in the Application filed before the Court on 29 September 2005, and in the *Memorial* submitted to the Court in 29 August 2006.

3.1.18 By thus arguing for a new interpretation of the 1858 Treaty, as finally and definitively interpreted in the Cleveland Award, Costa Rica clearly appears to be calling into question the character of those two sources of law governing her navigational rights on the San Juan River.

2. The Parties Did Not Request President Cleveland to Determine the Meaning of "con objetos de comercio", Nor Did President Cleveland Purport to Do So

3.1.19 As already noted above in paragraphs 3.1.2 to 3.1.3, on 24 December 1886, Costa Rica and Nicaragua concluded the Román-Esquivel-Cruz Convention of Arbitration in which they submitted certain questions to United States President Grover Cleveland for his final and binding decision. These questions are stated in Articles 1 and 6 of the 1886 treaty as follows:

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[167] CRM, Vol. 3, Annex 66.

> **"(1) The question pending between the contracting Governments in regard to the validity of the Treaty of Limits of the 15th April, 1858, shall be submitted to arbitration.**
>
> **[...]**
>
> **(6) If the decision of the Arbitration declares the validity of the Treaty, the same award shall declare whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats. Also the decision aforesaid shall, in case of the validity of the Convention, decide the other points of doubtful interpretation found by either of the Parties in the Treaty, and communicated to the other Party within 30 days from the exchange of the ratifications of this Convention".[168]**

3.1.20 The two principal questions submitted to the President of the United States as sole arbitrator were thus whether the 1858 Treaty of Limits was valid and whether Costa Rica had the right to navigate on the San Juan River with vessels of war or of the revenue service. As has been seen, the arbitrator answered the first question in the affirmative and, as to the second question, decided that Costa Rica did not have the right to navigate on the San Juan River with vessels of war but did have a right to navigate on the river with vessels of the revenue service – a right which, however, would arise only under certain narrowly circumscribed conditions. The present Subsection will return to the latter right presently.

3.1.21 As already noted, none of the eleven "points of doubtful interpretation"[169] communicated by Nicaragua raised the question of the scope of Costa

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[168] NCM, Annex 11 and CRM, Vol. 2, Annex 14.

[169] CRM, Vol. 3, Annex 36.

Rica's rights to navigate on the San Juan River "*con objetos de comercio*". This issue was thus not before the arbitrator.

3.1.22 Yet Costa Rica would have the Court give the Cleveland Award sweeping effect. Thus Costa Rica states in her *Memorial*: "[T]he Cleveland Award confirmed and authoritatively interpreted the extent of Costa Rican rights of use of the River."[170] The Award, of course, did no such thing. It simply answered the two questions put to the Arbitrator by the parties and decided upon the points of doubtful interpretation communicated by Nicaragua. Costa Rica, therefore, may not rely on the Cleveland Award as having decided anything with regard to the meaning of the phrase, "*con objetos de comercio*".

3.1.23 It is true that President Cleveland, in the second section of his Award, referred to an English translation of the phrase. Here the Arbitrator declared that Costa Rica "may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article..."[171] However, no conclusions may be drawn as to the meaning of the phrase "*con objetos de comercio*" on the basis of the arbitrator's having used an English translation of those words, particularly when their meaning was not at issue in the arbitration as just pointed out.

3.1.24 Moreover, the fact that President Cleveland enclosed the phrase "purposes of commerce" in quotation marks is striking. This clearly shows that while using the English translation of the phrase, the arbitrator was at pains not to prejudice the meaning of the original and authoritative

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[170] CRM, para. 1.04, at p. 2.
[171] CRM, Vol. 2, Annex 16.

Spanish text. It is entirely understandable that President Cleveland should have been careful in this regard because later in the same sentence of the Award he linked Costa Rica's right to navigate with "vessels of the revenue service" to "her enjoyment of the 'purposes of commerce' accorded to her in [Article 6 of the 1858 Treaty]..."[172] Costa Rica's right to navigate with vessels of the revenue service was therefore tied to, and measured by, her right to navigate "*con objetos de comercio*". That the content of the latter right was not before the arbitrator is underscored by his having enclosed the English translation of the phrase in quotation marks.

3.1.25 Further evidence of the fact that the meaning of the phrase "*con objetos de comercio*" was not at issue in the Cleveland Arbitration is provided by the *travaux préparatoires* of the Award. Under the authority of Article V, paragraph 5, of the Román-Esquivel-Cruz Convention of Arbitration of 24 December 1886[173], President Cleveland empowered Mr. George L. Rives, Assistant Secretary of State, to examine the arguments and evidence submitted by the two sides and to prepare a report to the President upon which a decision in the case might be based.[174] In the second part of his report, Mr. Rives addressed the questions raised in Article VI of the 1886 Arbitration Agreement, in particular, whether Costa Rica had the right of navigation on the San Juan River with vessels of war or of the revenue service. After stating that "[t]he answer to this question depends upon a consideration of Article VI of the Treaty of 1858,"[175] Mr. Rives set forth an English translation of Article VI. What is of present interest, however, is that he included in this version of Article VI the original Spanish versions of the phrases he appears to have considered to be most important for purposes of the arbitration. These phrases, and their Spanish counterparts inserted by Rives, are as follows:

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[172] CRM, Vol. 2, Annex 16.

[173] NCM, Annex 11. (Article 5)

[174] The instrument by which President Cleveland delegated this authority to George L. Rives is reproduced in J.B. Moore, History and Digest of International Arbitrations to which the United States has been a Party, vol. 2, p. 1945, note 2, U.S. Government Printing Office, Washington, DC., 1898. Mr. Rives communicated a copy of the President's order to Costa Rica and Nicaragua on the day it was made. For. Rel. 1888, part 1, pp. 455-456.

> -"…shall possess exclusively the dominion and supreme control (tendrá exclusivamente el dominio y sumo imperio)
> …
>
> [...]
>
> -…the perpetual right of free navigation (los derechos perpetuos de libre navegación)…
>
> [...]
>
> -…which is hereby declared to belong (que…. se establece corresponder …)".[176]

3.1.26 Mr. Rives utilized a translation of the phrase "*con objetos de comercio*", which also appears in Article VI, reading "for the purposes of commerce". However, he did not include the original Spanish version of this phrase in his report. It seems clear that if Rives had thought this phrase had significant bearing upon the issues before the arbitrator he would have included the original Spanish version, as he did with the phrases set forth above. Since he did not, the conclusion may be drawn that Mr. Rives did not believe that this phrase was in any way germane to the dispute before the arbitrator.

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[175] George L. Rives, "Second: If the Treaty of the 15th April, 1858 is valid, what is its true meaning in respect of the various matters submitted for decision?", Department of State, Washington, 2 March 1888, NCM, Annex 70.

[176] NCM, Annex 70.

3. Costa Rica May Navigate on the San Juan de Nicaragua River with Vessels of the Revenue Service Only to the Extent Necessary to the Exercise of her Right to Navigate with Articles of Trade (con objetos de comercio).This right is not mentioned in the 1858 Treaty

3.1.27 Costa Rica has repeatedly accepted that she may not navigate on the San Juan with warships or with revenue vessels exercising jurisdiction. For example, Article 6 of the Carazo-Soto Treaty of 1887 provides: "3° The right granted to Costa Rica…does not comprise the right to navigate with vessels of war or vessels of the revenue service exercising jurisdiction"[177] Similarly, in the Montealegre-Jiménez Convention Costa Rica accepted the Ayón-Chevalier Treaty of Canalization, which stated that:

> "…Costa Rica may establish customs and warehouses at the expense of the State, upon prior notice to the Government of Nicaragua, in no case, however, may Costa Rica place armed forces …"[178]

3.1.28 In her *Memorial*, Costa Rica understandably focuses upon the Cleveland Award and seeks to deflect attention from the 1858 Jerez-Cañas Treaty. Costa Rica also seeks to aggrandize her rights under the Treaty through references to treaties concluded by other states in the 19th century,[179] none of which is apposite to the unique circumstances of the San Juan, and through an extensive discussion of the character of United States Revenue Cutters in the late nineteenth century.[180] Costa Rica explains the relevance of the latter as follows: "In drawing a distinction between men-of-war and revenue cutters, the Cleveland Award evidently took into account contemporary naval practice..."[181] Costa Rica thus ignores entirely the special regime of the San Juan, a wholly Nicaraguan river, attempting to suggest that because U.S. Revenue Cutters that ply U.S. waters have certain characteristics, including armaments, Costa Rican revenue vessels wishing to sail on Nicaraguan waters – the San Juan River – have a right to be outfitted in like manner. Along this same line, Costa Rica accepts that "President Cleveland excluded the possibility of Costa Rica navigating with vessels of war" but goes on to state that he "acknowledged that *other public vessels* could do so, particularly 'such vessels of the Revenue Service as may be related to and connected with her enjoyment of the "purposes of commerce" accorded to her in said article, or as may be necessary to the protection of said enjoyment.'"[182] What those "other public vessels", apart from revenue vessels, might be, and precisely where President Cleveland stated that they would have a right to navigate on the San Juan, Costa Rica does not say.[183] Instead, it attempts to leave the implication that the San Juan should be treated as if it is not a Nicaraguan river but rather one over which jurisdiction, and sovereignty, is shared, as if the border followed the median line or *thalweg* of the stream rather than the right (Costa Rican) bank, in the pertinent sector.

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[177] Carazo-Soto Treaty, Managua, 26 July 1887. This treaty did not enter into force for want ratification by Nicaragua. CRM, Vol. 2, Annex 15.

[178] Montealegre – Jiménez Convention, 18 June 1869, Article 12, NCM, Annex 8.

[179] CRM, para. 4.80.

[180] CRM, paras. 4.81-4.82.

3.1.29 Nicaragua would respectfully request that the Court put to one side Costa Rica's arguments concerning treaties between other states concerning rivers that are not situated similarly to the San Juan, as well as interesting but in the end irrelevant information about United States Revenue Cutters in the nineteenth century. As shown in Chapter 4, Section 3, below, the latter information actually reveals why President Cleveland was so careful to constrain narrowly Costa Rica's navigation with such vessels – namely, because they can easily be transformed or evolve into warships, with which he had found Costa Rica had no right to navigate on the San Juan. To be sure, as shown in Chapter 2, Nicaragua would have the right, within her police power, to stop any vessel suspected of exceeding Costa Rica's navigational rights under the 1858 Treaty and the Cleveland Award. But rather than accepting Costa Rica's invitation to dwell upon inapposite treaties between third states and irrelevant information regarding revenue vessels, also of a third state, Nicaragua would direct the Court's attention to the principal source of the parties' rights and obligations: the 1858 Jerez-Cañas Treaty.

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[181] CRM, para. 4.81.

[182] *Ibid.*, para. 4.83(emphasis added).

[183] The second Paragraph of the Cleveland Award simply indicates that Cost Rica "has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the "purposes of commerce" accorded to her in said Article, or as may be necessary to the protection of said enjoyment." Nowhere does it mention "other public vessels".

3.1.30 Specifically, in reading the Cleveland Award, it is important to bear constantly in mind that vessels of the revenue service are not mentioned at all in the Jerez-Cañas Treaty. Article 6 of that agreement, which in fact is silent as to the right of navigation by any sort of public vessel,[184] restricts Costa Rica's right to navigate on this wholly-Nicaraguan river to vessels carrying articles of trade ("*objetos de comercio*"). These would ordinarily be private commercial vessels carrying goods to market or to be shipped abroad. Costa Rica's *Memorial* ignores these boats almost entirely, seeking instead to construct an inverted pyramid of rights upon these simple craft. The rights that Costa Rica asks the four words "*con objetos de comercio*" to bear seem to entail navigation on the San Juan by Costa Rican public vessels, possibly armed and of various sizes and descriptions.

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[184] This point did not escape George L. Rives, who noted with reference to Article 6 of the 1858 Jerez-Cañas Treaty that "the foregoing Article it will be observed is silent as to the right of navigation by public vessels." Report of George L. Rives, (Second), NCM, Annex 71.

Surely this cannot have been the intent of the parties to the Jerez-Cañas Treaty, or indeed of President Cleveland. Some background on how the question of navigation by revenue vessels arose confirms that this is the case.

3.1.31 The specific question to be examined is why, in the arbitral agreement, the parties requested the arbitrator to determine whether Costa Rica had a right to navigate on the San Juan River with vessels of the revenue service, especially when the 1858 Treaty itself appears, by its silence on this point, to answer this question in the negative. Some light is shed on the issue by an episode involving a public steamship sent by Costa Rica, almost thirty years after the conclusion of the Jerez-Cañas Treaty, to navigate on the San Juan River, under protest by Nicaragua.

4. Origin of the Controversy over Costa Rica's Navigation with Vessels of the Revenue Service: The 1886 Dispute between the Parties over Costa Rica's Use of a National Steamship to Patrol the Entire Length of the San Juan River Navigable by Costa Rica to Conduct Customs Reconnaissance and Surveillance

3.1.32 An episode in 1886 involving a Costa Rican customs steamship is alluded to, although only with great subtlety, in Article IX of the 1886 Román-Esquivel-Cruz Convention of Arbitration. That Article states as follows:

> "Pending the decision of the validity of the Treaty, the Government of Costa Rica, consents to suspend the fulfilment of its agreement of 16th March last relative to the navigation of the River San Juan by a Government steamer."[185]

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[185] NCM, Annex 11, see also CRM, Vol. 2, Annex 14.

3.1.33 The controversy between the two countries regarding the Costa Rican national steamship stems from two decrees adopted by the Government of Costa Rica on 16 March 1886. Decree No. XXXI of that date provides for the creation of "a guard, that will depend on the General Treasury Inspection, which will be stationed at the mouth of the Colorado River, subject to the provisions of the corresponding law."[186] The decree further provides that "this guard will consist of one Commander and five guards..."[187]

3.1.34 According to Decree No. XXXII of the same date (16 March 1886), the customs post "shall have at its disposal a national steamer with its respective crew made up of a captain-pilot, an engineer, and a stoker and his helper."[188] Its tasks were to include the following:

> " 1st To prevent contraband in the water and territories of its circumscriptions.
>
> 2nd To give the relevant notice and information for the persecution of smuggling to the guards in the San Carlos and Sarapiquí, or the Inspector General, according to the circumstances.
>
> 3rd To request assistance from the guard of Sarapiquí and San Carlos and obtain it whenever the Commander of Colorado deems it necessary....
>
> 5th To reconnoitre at least once a week the River San Juan, Colorado, Sarapiquí and San Carlos; the first in the whole extent that it is navigable for Costa Rica, the second in its entire extent, and the latter two along the entire stretches that are *navigable by steamer*...."[189] (emphasis added)

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[186] CRM, Vol. 6, Annex 205.
[187] *Ibid.*
[188] CRM, Vol. 6, Annex 206.
[189] *Ibid.*

3.1.35 On 5 June 1886, the Minister of Foreign Relations of Nicaragua, Francisco Castellón, sent a note of protest to the Minister of Foreign Relations of Costa Rica, Ascensión Esquivel, concerning the decree's provision for a national steamship. Minister Castellón, assuming arguendo that the 1858 Treaty was valid, reminded his counterpart that Article 6 of the 1858 Treaty reserves for Nicaragua the exclusive dominion and sovereign jurisdiction over the waters of the San Juan, conceding to Costa Rica nothing more than the right to navigate "*para objetos de comercio*".[190]

3.1.36 The Costa Rican Foreign Minister responded in a Note of 29 June 1886, that the decree providing for a national vessel to travel on that part of the San Juan River that is navigable to Costa Rica does not impair the rights of Nicaragua. He argued that while the 1858 Treaty reserves for Nicaragua exclusively the dominion and sovereignty over the waters of the San Juan, it also allows Costa Ricans to navigate with articles of commerce and gives the Government of Costa Rica:

> "…the same navigational rights with all kinds of vessels, for if it is to fulfil the obligations imposed on it [the treaty] and which it [Costa Rica] expressly recognizes of contributing to the custody and defence of the river in case of external aggression, it is clear that it has the right to make use of the indispensable means to comply with that duty. Furthermore, the vessel that is to navigate the San Juan shall limit itself to use the waters of the river to cross from one to the other Costa Rican river and it shall not exercise any jurisdictional act over them."[191]

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[190] NCM, Annex 28, Note from Minister of Foreign Affairs of Nicaragua, Francisco Castellón, to Minister of Foreign Affairs of Costa Rica, Ascensión Esquivel, 5 June 1886.

[191] CRM, Vol. 3, Annex 31, Note from the Minister of Foreign Affairs of Costa Rica, Ascensión Esquivel, to Minister of Foreign Affairs of Nicaragua, Francisco Castellón, 29 June 1886.

3.1.37 Nicaraguan Foreign Minister Castellón replied to Costa Rican Foreign Minister Ascensión Esquivel on 3 August 1886, stating in relevant part:

> "The navigation on San Juan waters of a Costa Rican national steamship carrying armed forces of that Republic- the verification of which this Government finds particularly surprising- following my aforementioned letter 5th June, is an outright violation of Nicaragua's sovereign rights, and cannot be justified by invoking a treaty the validity of which is being questioned, and that even if it were valid, would not be authorized except when, in a given case, as with all alliance, Nicaragua would require Costa Rica to comply with the rights, stipulated therein, to concur to its guard and defence.
> The President, therefore, demands Your Excellency's Government withdraw the abovementioned steamship from the waters of the San Juan".[192]

3.1.38 Costa Rican Foreign Minister Esquivel responded to this note from his Nicaraguan counterpart on 31 August 1886, in the following terms:

> "...Costa Rica has the perpetual right to navigate the San Juan River, or part of it, in accordance with the treaty: that it is obliged, and naturally so, to guard and defend the river, since it has the use of its waters, and because a part of its right bank belongs to it, because the river is the common entry for both Republics, and it is in the direct interest of both to defend it: that, given this obligation, Costa Rica may use the necessary means to fulfil it and it may, for the same reason, navigate the river in any kind of vessels: that, in order to do so, Costa Rica does not require Nicaragua's approval or request, since it would not be acting as Nicaragua's ally but in the exercise of its own right: and

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[192] CRM, Vol. 3, Annex 32, Note from the Minister of Foreign Affairs of Nicaragua, Francisco Castellón, to Minister of Foreign Affairs of Costa Rica, Ascensión Esquivel, 3August 1886.

> that, should the opposite occur, Costa Rica would be left totally defenceless at Nicaragua's will".[193]

3.1.39 Then, as has been seen, on 24 December 1886, the Román-Esquivel-Cruz Arbitration Convention was signed, containing the aforementioned clause regarding the suspension of the Costa Rican Decree of March 16 of that year providing for the navigation of a national steamship on the San Juan River.[194]

3.1.40 But pending the outcome of the arbitration the matter of the Costa Rican steamship remained unresolved, and on 14 February 1887, Nicaraguan Foreign Minister Joaquín Elizondo addressed a note on the subject to his Costa Rican counterpart, stating in part:

> "The decision of the Government of Costa Rica last year to establish a customs post at the mouth of the Colorado River, as a dependence of the General Inspection Unit of the Ministry of Finance; to make available to said customs post a national steamship to carry out reconnaissance at least once a week on the San Juan, Colorado and Sarapiquí rivers; and to establish a village on the left bank of the second of these rivers to be named Irazú, *was precisely the cause that rekindled the old border issue between the two Governments and the debate acquired such proportions that it seemed to close the door to a peaceful outcome.* It was this aspect of the debate which led the President of Guatemala to offer his mediation, which after long debates, in which the Minister Plenipotentiary of Costa Rica did not seem as conciliating as expected, led to the signing on 24 December of a Convention at the capital of that Republic, which shall bind the two Contracting Parties, once it has been ratified, to submit to arbitration the question regarding

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[193] CRM, Vol. 3, Annex 34, Note from the Minister of Foreign Affairs of Costa Rica, Ascensión Esquivel, to Minister of Foreign Affairs of Nicaragua, Francisco Castellón, 31 August 1886.
[194] CRM, Vol. 6, Annex 206.

> the validity or nullity of the Treaty of Limits signed in 1858, for which they have appointed the President of the United States of America as arbitrator."[195] (emphasis added)

3.1.41 The principal impetus for the dispute over the validity of the 1858 Treaty, as well as the controversy over Costa Rica's right to navigate on the San Juan River with public vessels, including vessels of the revenue service, thus seems clear. It was the Costa Rican decree of 16 March 1886, authorizing the use of a national steamship for customs enforcement, including on the San Juan River, and its implementation[196]. When this dispute could not be resolved through negotiation, it was submitted to arbitration by the President of the United States. Still, the diplomatic exchanges continued.

3.1.42 On 21 March 1887, Costa Rican Foreign Minister Cleto González Víquez responded to the Nicaraguan note of 14 February, noting the recent construction of roads in the "fertile" regions of the Sarapiquí, San Carlos and Frío rivers in his country, and laying stress on Costa Rica's concern with the use of the San Juan River to smuggle goods into the country that had arrived at the port of San Juan del Norte, impairing customs revenues of Costa Rica. After indicating Costa Rica's interest in exploring the development of the "valuable" area referred to, he continued:

> "...[The Government] has the duty to avoid the defalcation of customs duties derived from smuggling, to impede the illegal exportation of natural products from those regions and to object to the undue importation that often takes place by those means. It is true that the Government

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[195] NCM, Annex 31. Note of 14 February 1887, from the Minister of Foreign Affairs of Nicaragua, Joaquín Elizondo, to the Minister of Foreign Affairs of Costa Rica, Cleto Gonzalez Viquez.
[196] CRM, Vol. 6, Annex 206.

> commissioned Mr. Alpizar, through the Ministry of Finance, to carry out a reconnaissance not of the strategic points, but rather of the points which are more accessible for smuggling and of the zone in general, on the one hand, to facilitate industrial activity and, on the other hand, to establish customs posts at those locations which provide greater confidence to smugglers."[197]

Costa Rica thus seems in effect to be arguing, much as it is today, that the development of her resources justifies the unilateral expansion of her rights of navigation in Nicaraguan territory, on the San Juan River.

3.1.43 On 26 July 1887, less than a year before President Cleveland rendered his Award, Nicaragua and Costa Rica signed an agreement by which they intended to settle the issues pending between them regarding the San Juan River. Article 6.3 of this agreement provided that "[t]he right granted to Costa Rica to navigate with articles of trade on the San Juan River, from its mouth up to 3 English miles below Castillo Viejo, does not comprise the right to navigate with vessels of war or vessels of the revenue service exercising jurisdiction" [198] Article 8 of the agreement provided that "the vessels of the revenue service of Costa Rica which need to protect any point on the right bank of the San Juan which belongs to Costa Rica, or on the part of the Frío River which belongs to Costa Rica, or need to assist the established customs posts, may cross Nicaraguan waters as long as they do not exercise any jurisdictional act thereon."[199] That is, they may only use "Nicaraguan waters" – the San Juan River – as a means of getting from point A to point B, both points being on the Costa Rican bank of the river, and may not "exercise jurisdiction" thereon, i.e., may not conduct any official activities such as stopping a vessel or arresting its occupants while on the river.

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[197] NCM, Annex 32. Note of 21 March 1887, from the Minister of Foreign Affairs of Costa Rica, Cleto González Víquez, to Minister of Foreign Affairs of Nicaragua, Joaquin Elizondo.
[198] CRM, Vol. 2, Annex 15, Carazo – Soto Treaty.
[199] *Ibid.*

3.1.44 This agreement never entered into force; it was ratified by Costa Rica but not by Nicaragua. However, it is of present interest for two reasons: First, through its signature and ratification of the agreement, Costa Rica indicated clearly that it accepted the proposition that Costa Rica's right to navigate on the San Juan River with articles of trade "does not comprise the right to navigate with vessels of war or vessels of the revenue service exercising jurisdiction."[200] And second, the fact that Nicaragua did not give her consent to be bound by the agreement may be taken as an indication that even transit on the river with such vessels, without exercising any jurisdiction, was unacceptable to Nicaragua.

3.1.45 Not only are vessels of the revenue service not mentioned in the 1858 Treaty, the Cleveland Award, while permitting Costa Rica to navigate with such vessels on the San Juan River, sharply restricts and conditions that right. A careful reading of the Award itself and of its preparatory work clearly shows that Costa Rica does not possess the rights of navigation with public vessels it claims in her *Memorial*.

5. The Restrictiveness of Costa Rica's Rights to Navigate with Vessels of the Revenue Service is Evident from the Changes made by President Cleveland to the Recommendations in the Second Part of Rives' Report

3.1.46 In light of the practice that has just been reviewed it is clear that the right of Costa Rica to navigate in Nicaraguan territory, on the San Juan River, is sharply restricted by the 1858 Treaty and that Nicaragua has always interpreted the Treaty in this way. It is therefore surprising to find that Costa Rica claims virtually unrestricted rights of navigation in her *Memorial*. For example, in Chapter 4 of her *Memorial*, entitled "Costa Rica's Navigational and Related Rights", Costa Rica concludes as follows with regard to her right of navigation under the Treaty on the San Juan River:

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[200] CRM, Vol. 2, Annex 15.

> "1) Costa Rica has a conventional perpetual right of free navigation over the portion of the San Juan where it is a riparian State, and is entitled to exercise this right without restrictions or interference."[201]

This implication that Costa Rica has an unrestricted right of free navigation on the San Juan is without support either in the 1858 Treaty or in the Cleveland Award. This is evident from both the text of the Treaty itself and President Cleveland's rejection of recommendations of broader navigational rights based on sources outside the Treaty.

3.1.47 As noted earlier (paragraph 3.1.25), President Cleveland delegated authority to George L. Rives to prepare recommendations for his Award in the case, as permitted by Article V, paragraph 5, of the 1886 Román-Esquivel-Cruz Convention of Arbitration. Pursuant to this authorization, Mr. Rives prepared a report comprised of two parts, corresponding to the two questions asked of the arbitrator in the Román-Esquivel-Cruz Convention: the first concerned the validity of the 1858 Treaty[202]; and the second concerned navigation by Costa Rica on the San Juan River with vessels of war and of the revenue service, as well as the points of doubtful interpretation[203]. President Cleveland adopted the first part of Rives' report as submitted, but made substantial changes to recommendations made in the second part, adopting positions that were, in essence, diametrically opposed to Rives' recommendations on key issues. The changes are reflected in the *Second* paragraph of the Cleveland Award[204]. Since Costa Rica's alleged rights of navigation by public vessels bear a striking similarity to the recommendations by Rives that were rejected by President Cleveland, those recommendations bear scrutiny.

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[201] CRM, para 4.129.

[202] NCM, Annex 70. Report of George L. Rives. 2 March 1888.

3.1.48 The Draft award prepared by George L. Rives contains a handwritten introductory note which states as follows:

> "The following is the draft award prepared by me and handed to the President. The corrections appearing thereon in ink are made by the President, and are all in his own handwriting. It was returned to me by the President on March 17th, 1888. G. L. Rives".[205]

3.1.49 This document clearly shows that Rives presented an Article 2 of the Award which is very different from that which President Cleveland corrected by hand and eventually incorporated into his Award. Its contents and the changes made by Cleveland provide insight into the different approaches of – and outcomes reached by – the two individuals.

3.1.50 The approach followed by Rives was similar to that advocated by Costa Rica in the arbitration – i.e., to assimilate the right to navigate on the San Juan River to the general right to navigate in the waters of a state's territorial sea. After examining the writings of authorities on international law (Hall, Blüntschli, Calvo and Twiss) as well as case law on this point, Rives concluded that although there was "at least an apparent contradiction between these authorities,…it is understood that civilized nations at the present day, impose no restriction upon the friendly visit of foreign men-of-war in time of peace; and this general usage may be said to constitute an imperfect right to entitle such vessels to claim hospitality."[206] He therefore recommended to President Cleveland the following answer to the second question put to the arbitrator:

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[203] NCM, Annex 71. Report by George L. Rives (Second).

[204] CRM, Vol. 2, Annex 16.

[205] NCM, Annex 72. Draft Award prepared by G. L. Rives and handed to the Arbitrator Mr. Grover Cleveland. 17 March 1888.

> "The preliminary question of interpretation as to the right of navigation of the San Juan by public vessels of Costa Rica should, therefore, in my judgment, be answered by saying that the vessels of war and of the revenue service belonging to Costa Rica have the same privilege of navigating the River San Juan as are usually accorded in their territorial waters by civilized nations to the public vessels of friendly powers in time of peace, - but no other, or greater privileges."[207]

3.1.51 This conclusion – which, again, suggested rights similar to those being claimed by Costa Rica today – was radically altered by President Cleveland in his Award. Rather than searching for a situation that was analogous to the one established by the 1858 Treaty, President Cleveland began – and ended – with the treaty itself. This is evident from paragraph *Second* of his Award, in which he refers, directly or indirectly, to the Jerez-Cañas Treaty three times. This short but crucial section reads in its entirety as follows:

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[206] NCM, Annex 71. Report by George L. Rives (Second).

[207] *Ibid*, pp. 218-219 of handwritten version.

> "The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[208]

3.1.52 The first reference to the treaty occurs in the first line ("under said treaty"); the second several words later, when the arbitrator refers to "the stipulations contained in the sixth article"; and the third in the final portion of the section, relating to vessels of the revenue service, when President Cleveland clearly ties any right Costa Rica may have to navigate with such vessels to "enjoyment of the 'purposes of commerce' accorded to her in said article." The importance ascribed by President Cleveland to the treaty was such that, as demonstrated elsewhere in the present *Counter-Memorial*,[209] he took care not to prejudice the meaning of its original Spanish text by enclosing the phrase, "purposes of commerce" in quotation marks, thus referring back to the original text.

3.1.53 Thus President Cleveland took an entirely different approach from that followed by Rives. Since the treaty was valid, and made unmistakably clear that the San Juan was part of Nicaraguan territory, any right Costa Rica might have to navigate on the river with vessels of the revenue service would have to find its source in the treaty; it could not be separated from the agreement. In particular, no right of navigation, whether with public or private vessels, could be disassociated from navigation with articles of trade (*objetos de comercio*). Interestingly, Costa Rica herself later, in the context of the Alexander Arbitration, argued that the Treaty should be interpreted literally: "The principles upon which the language and intent of treaties are to be interpreted are well set forth in the Costa Rican argument by many quotations from eminent authors. All concur that words are to be taken as far as possible in their first and simplest meanings – 'in their natural and obvious sense, according to the general use of the same words'– 'in the natural and reasonable sense of terms' – 'in the usual sense, and, not in any extraordinary or unused occupation'."[210] This position contradicts Costa Rica's current attempts to build an edifice of rights – to navigate with armed public vessels, re-supply border posts, carry tourists, etc. – on the slender reed of "articles of commerce."

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[208] CRM, Vol. 2, Annex 16. Cleveland Award, section "*Second*".

[209] See Chap. 4 paras. 4.1.8-4.1.48, below.

3.1.54 The language in paragraph *Second* of the Cleveland Award is especially worthy of close attention since the arbitrator substituted it entirely for the proposal made by George Rives for that part of the Award. For President Cleveland, the only navigation by Costa Rican vessels of the revenue service that was permitted by the treaty was that which is "related to and connected with" the right to navigate with articles of trade. As if to avoid any possible misunderstanding, the arbitrator requires that navigation with revenue vessels be both (a) "related to" *and* (b) "connected with" navigation with articles of trade. He thus underscores the inextricable connection between public revenue vessels and private boats carrying articles of trade: the two go together, but only if the former are "related to and connected with" the latter.

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[210] NCM, Annex 73. "Award Number 4" of Engineer Arbitrator Alexander. Also cited in National Geographic magazine by author Arthur P. Davis (Chief Hydrographer, Isthmian Canal Commission) in his article "Location of the Boundary between Nicaragua and Costa Rica."

3.1.55 However, the arbitrator also conditions Costa Rica's right to navigate on the San Juan River with vessels of the revenue service upon its being "necessary to the protection of said enjoyment" (i.e., enjoyment of the right to navigate with articles of trade). Since Costa Rica was capable of enforcing her customs laws from her own territory in 1888, and is even more capable of doing so today, enforcing those laws by patrolling the river in boats is not "necessary". Indeed, it is difficult to imagine situations in which navigation on the San Juan with public vessels of the revenue service would be "necessary".

3.1.56 In sum, for President Cleveland, Costa Rica's right to navigate on the San Juan River with vessels of the revenue service, which was not provided for by the treaty, could be recognized only to a very limited extent and under strict conditions. He found that there was an inextricable link between navigation with vessels of the revenue service and navigation with articles of trade, specifying that navigation with revenue vessels must be "related to and connected with" navigation with articles of trade. This leaves no doubt that, for President Cleveland, Costa Rica does not have an autonomous right of navigation on the San Juan. In further requiring that navigation with revenue vessels be "necessary" to the protection of navigation with articles of trade, the arbitrator set the bar very high, since while protection of such navigation by use of revenue vessels might be convenient, it would seldom be "necessary". According to President Cleveland, therefore, there could be no navigation by Costa Rican vessels of the revenue service except in conjunction with the enjoyment of the right to navigate with articles of trade; and all navigation by revenue vessels had to be related to and connected with Costa Rica's enjoyment of navigation with articles of trade or necessary to the protection thereof.

3.1.57 It is thus clear that the Cleveland Award does not recognize an objective, abstract right of navigation by Costa Rican revenue service vessels. It is a right that is activated only when certain conditions obtain. Under any other circumstances, while such navigation might be convenient, "it is not so necessary an incident to the right of Costa Rica to enforce her customs laws as to be inevitably implied *ex necessitate* from the provisions of the Treaty."[211] This is only sensible, in view of Nicaragua's exclusive possession of dominion and supreme control of the San Juan, according to the terms of the Treaty.

CONCLUSIONS

3.1.58 The following points emerge from the foregoing analysis:

a. First, neither in the agreement submitting their dispute to arbitration nor otherwise did the parties request President Cleveland to determine the meaning of the phrase, "*con objetos de comercio*", and the arbitrator did not purport to do so.

b. Second, taken together, the Cleveland Award and those sections of the second part of Rives' report that were not in any way contradicted by the arbitrator make clear that it is the 1858 Treaty that, first and foremost, governs the rights and obligations of the parties. In his Award, President Cleveland was at pains to apply the terms of the Treaty, and not to go beyond those terms. This is amply demonstrated by his repeated references to the Treaty in paragraph *Second* of the Award. It is therefore clear that the

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[211] NCM, Annex 71. George L. Rives, Report to President Cleveland, (Second), p. 211 of original handwritten version.

Award must be understood in the light of the Treaty, not the other way around as Costa Rica seems to imply.

c. Third, the Treaty makes no mention of vessels of the revenue service. The question of whether Costa Rica could navigate on the San Juan River with such vessels thus arose not from the Treaty itself, but from Costa Rica's unilateral decision in 1886 to navigate on the San Juan with a national steamship charged with customs enforcement, in clear and blatant contravention of the provisions of the Treaty. It is evident beyond any doubt that President Cleveland was acutely aware of the need not to enlarge Costa Rica's rights of navigation beyond what was expressly provided for in the Treaty, except insofar as was strictly necessary under specific circumstances: President Cleveland rejected a broad right of navigation proposed by his delegate, George L. Rives, based not on the Treaty but on an analogy to marine navigational rights; and in recognizing a limited right to navigate with vessels of the revenue service under exceptional circumstances President Cleveland made clear that there was no such right except to the extent its exercise was closely "related to and connected with" navigation with articles of trade, and except to the extent that navigation with such vessels was "necessary" under the circumstances. Mere convenience is not enough to trigger such a right, especially since under most circumstances customs enforcement could take place in Costa Rican territory. It follows that nothing said in either the Award or Rives' report can be construed to imply a right of Costa Rica to navigate on the San Juan for the purpose of re-supplying border posts: there are no articles of trade involved in such navigation; and it is not necessary, since it can be accomplished by land.

d. And fourth, in any event, no armed navigation by Costa Rican vessels is permitted by the Treaty, as interpreted in the Award, without the prior authorization of Nicaragua. Not only would this not be necessary, it would fly in the face of President Cleveland's finding that Costa Rica "has not the right of navigation of the river San Juan with vessels of war". It is a slippery slope from revenue vessels to vessels of war. George Rives recognized this, and President Cleveland was careful in framing his Award to establish conditions designed to prevent revenue vessels from evolving into warships with liberal access to Nicaraguan waters. Nor may Costa Rican revenue vessels exercise any form of jurisdiction on the San Juan, even if the twin conditions of a link to "*objetos de comercio*" and necessity are established, since this would violate the jurisdiction and prerogatives retained by Nicaragua by virtue of her sovereignty over the river.

Section 3. 2

Other Documents Invoked by Costa Rica

3.2.1 As shown in Chapter 2 and the previous Section of this Chapter, the Jerez-Cañas Treaty of Limits of 15 April 1858 is *the* relevant instrument in the present dispute. However, other instruments have been mentioned in the *Memorial* of Costa Rica. It is therefore appropriate to evaluate their legal significance in this case.

3.2.2 In her *Memorial*, Costa Rica has mentioned a number of other texts to which it seems to confer a legal authority. They can be divided into two categories:

- some relate to the jurisdiction of the Court in the present case;
- others are supposed to be relevant on the very substance of the case.

3.2.3 The first ones relating to the jurisdiction of the Court have been dealt with in the Introduction of the present *Counter-Memorial*[212] and there is no need to go back to them.

3.2.4 Costa Rica also bases herself on various instruments which more directly relate to the subject matter of this case, in particular:

- the Roman-Esquivel-Cruz Convention of 24 December 1886 submitting the question of the validity of the Treaty of 15 April 1858 to the arbitration of the President of the United States[213];
- the 1916 Judgment of the Central American Court of Justice[214];
- the Sevilla - Fournier Agreement concluded pursuant to Article IV of the 1949 Pact of Amity of 9 January 1956[215];
- the "Memorandum of Understanding" of 5 June 1994 between the Ministers of Tourism of both countries[216];

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[212] NCM Introduction, para. 3.

[213] CRM, p. 18, para. 2.32, or p. 20, para. 2.38 (see the partial reproduction of this Convention in CRM, Vol. 2, Annex 14 and NCM, Annex11).

[214] CRM, p. 2, para. 1.04 and especially pp. 21-25, paras. 2.42-2.49. For the English translation of the Award see 11 *A.J.I.L.* 181-229 (1917), reproduced in CRM, Vol. 2, Annex 21.

[215] CRM, p. 2, para. 1.04, p. 3, para. 1.08, p. 26, para. 2.52, p. 72, paras. 4.70-4.71, pp. 88-89, para. 4.121-4.123 or p. 133, para. 5.139 (see the partial reproduction of this Agreement in CRM, Vol., 2, Annex 24).

[216] CRM, p. 33, para. 3.20 (see CRM, Vol. 2, Annexes 25 and 26). However, the content of this instrument, whatever its legal nature shows that Nicaragua has the right to regulate tourism on the

- a Joint-Communiqué issued on 8 September 1995 by the Commander-in-Chief of the Army and the Chief of National Police for Nicaragua, and by the Minister of Public Security and a Colonel of the Police Force on behalf of Costa Rica[217];

- various so-called "understandings" and joint-communiqués of the year 1998[218]; or

- another agreed arrangement resulting from an exchange of letters of 28-29 June 2000[219].

3.2.5 The content and the interpretation of those various instruments will be discussed in due course in the present *Counter-Memorial*. Suffice it to note at this stage that the legally binding nature of the 1886 Convention and of the 1956 Agreement, which does nothing more in its Article 1 than to reaffirm "the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888", are not challenged.

3.2.6 The Judgment of the Central American Court of Justice of 30 September 1916[220] is of limited relevance in the present case. In effect, the action brought by Costa Rica at the time did not relate to the extent of her navigational rights, but only, as emphasized by the Court, to "the conclusion of a treaty between the latter [the Government of the Republic of Nicaragua] and the Government of the United States of North America, relating to the construction of an interoceanic canal"[221]. Of course, the

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waters of the San Juan de Nicaragua River and that Costa Rica was clearly conscious that she had no right to free navigation for tourism purposes under the 1858 Treaty.

[217] CRM, pp. 83-84, para. 4.104. CRM, Vol 2, Annex 27.

[218] CRM, pp. 34-35, para. 3.23, p. 37, para. 3.31 or p. 130, paras. 5.129-5.130 (see CRM, Vol. 2, Annexes 28, 49, 50 and 51, and 134, 141 or 144).

[219] CRM, p. 40, para. 3.38. Also CRM Vol. 3, Annexes 64 and 65.

[220] CRM, Vol. 2, Annex 21.

[221] CRM, Annex 21, p. 122.

Central American Court had to take into account the relevant legal instruments in order to ascertain the effect and impact of the Bryan-Chamorro Treaty[222] on these instruments. Therefore, the 1858 Treaty and the 1888 Cleveland Award "serve[d] as a guide to th[e] Court"[223] in order to establish the applicable legal regime – but nothing more. The Judgment did not establish any new rights or obligations for Costa Rica or Nicaragua concerning the San Juan River. Costa Rica seems to accept this fact: in her *Memorial* reference to the 1916 Judgment is made only in order to submit that it reaffirmed the rights recognized by the 1858 Treaty as interpreted by the 1888 Cleveland Award[224]. By no means did the Central American Court's Judgment further specify the rights recognized by the relevant instruments, *i.e.* the 1858 Treaty and the Cleveland Award, or create any new rights for the Parties[225].

3.2.7 The legally binding nature of the other documents on which Costa Rica bases herself is however even more dubious.

3.2.8 Thus, the "Memorandum of Understanding" signed by the Ministers of Tourism of Costa Rica and Nicaragua, Carlos Roesch and Fernando Guzmán, at Barra del Colorado on 5 June 1994 can certainly not be defined as "treaties" within the usual meaning of the word in public international law:

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[222] CRM, Vol 2, Annex 20.
[223] *Ibid.* p. 160.
[224] CRM, p. 80, para. 4.96 and p. 81, para. 4.98.
[225] NCM, Annex 47. Note by Minister Tovar of 6 December 2004 (DM-566-04).

- they have been signed by the Ministers of Tourism, not by authorities which, "in virtue of their functions (…) are considered as representing their State" without having to produce full powers;

- they do not provide for their transmission to the Secretariat of the United Nations for registration and publication, and have not been transmitted by either country to that effect;

- they have not been subject to any formality for formal adoption or incorporation into the legal order of either State; and

- their drafting clearly shows that it was not the purpose of the signatories to legally bind their respective States; expressions like: "They will endeavour…", the Ministers (not the States as such) express their "willingness to cooperate" or "to offer [their] assistance" or "their commitment to participate in and cooperate with the efforts of…", "Both Ministers will take all the steps they consider necessary for.." or "expressed[[226]] their whole hearted intention…", the Ministers "agree to seek out and implement all the mechanisms at their disposal in order to promote…", endeavour "insofar as it is possible" [227], etc., are telling in this respect.

3.2.9 Indeed this is not a terminology that implies the creation of "rights and obligations in international law for the Parties"[228]. Those instruments constituted at best "gentlemen's agreements" without binding force for the signatories. This conclusion holds true *a fortiori* with respect to the Joint-Communiqué of 8 September 1995 (the so-called "Cuadra-Castro

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[226] The Spanish original text is in the present (*manifiestan*), not the past tense (*expressed*).

[227] CRM, Vol. 2, Annexes 25 and 26.

[228] Cf. ICJ, Judgment, 1 July 1994, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, ICJ Reports* 1994, p. 121, para. 25; see also: Judgment, 19 December 1978, *Aegean Sea Continental Shelf, ICJ Reports* 1978, p. 39, para. 96, or p. 44, para. 107.

Agreement"), which is nothing more than a commitment to cooperate[229], devoid of any particular legal significance, and the 1998 so-called "agreements" invoked by Costa Rica.

3.2.10 In the first place, it will be immediately apparent that, concerning the latter, there is simply no basis for alleging that the high level contacts between authorities of the two States 'were perceived' to have given rise to "an understanding reached on 16 July 1998"[230]. By itself this drafting denotes embarrassment on the part of Costa Rica – and for good reason: the Costa Rican side is incapable of even giving a text or a precise content to this alleged "understanding", whose sole evidence is supposed to be found in a press article published in the Costa Rican newspaper *La Nación*, which by no means mentions any kind of agreement – and even the unilateral declarations quoted from officials of both side do not coincide[231].

3.2.11 The Cuadra-Lizano Joint-Communiqué was signed on 30 July 1998 by the Minister of Defence of Nicaragua and the Minister of Government, Police and Public Security of Costa Rica. The wording used in this instrument resembles that of an agreement but certainly not a self-executing one since it was conditioned on the adoption of "operational mechanics … in a subsequent meeting of senior officers from the Nicaraguan military authorities and the Costa Rican police force"[232]. However, again, the signatories are not national authorities who "in virtue of their functions (…) are considered as representing their State" at the international level and it was not contemplated that the "agreement" be communicated to the Secretariat of the United Nations for registration and publication. In any case, if it was anything more than just a joint communiqué, it was declared "legally null and void and non-existent" ("*jurídicamente nulo e inexistente*") by the Government of Nicaragua, as was explained by the Nicaraguan acting Minister of Foreign Affairs in a letter to the Costa Rican Minister of Foreign Affairs and Worship of 11 August 1998[233].

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[229] See CRM, Vol. 2, Annex 27.

[230] CRM, p. 34, para. 3.23.

[231] "Prohibition Lifted", *La Nación*, San José, 17 July 1998 – original Spanish text not provided by Costa Rica; CRM, Vol. 5, Annex 134.

[232] CRM, Vol. 2, Annex 28, third point, para. 3; see also Vol. 5, Annex 143, p. 656.

3.2.12 As explained in that letter, the reason for this was that this agreement could be seen as contravening the constitutional requirements in force in Nicaragua. Not only was it signed by authorities not vested with treaty making powers[234], but also, after due analysis, it appeared that it could infringe the national sovereignty of Nicaragua[235]. The National Assembly of Nicaragua considered that said agreement could be "harmful to the national sovereignty of the Nicaraguan territory, clearly established in the Jerez-Cañas Treaty, the Cleveland Award and consecrated in our Political Constitution"[236] and approved the Decision of the Foreign Minister to declare null and void the Joint-Communiqué. Moreover, in accordance with Article 138 (12) of the Constitution, it belongs to the National Assembly "To approve or reject all international treaties, conventions, pacts, agreements and contracts covering economic, international trade, regional integration, defense and security; those which increase the external debt or commit the credit of the nation and those that constitute an obligation to the internal legal order of State"[237] . In any case, it was certainly within the powers of Nicaragua not approve this "agreement".

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[233] CRM, Vol. 3, Annex 49.

[234] NCM, Annex 65, Article 150 of the Political Constitution of Nicaragua of 1987 as modified in 1995, which provides: "The President of the Republic has the following powers: … 8. To direct the international relations of the Republic. To negotiate, enter into and sign treaties, conventions or agreements and other instruments set forth in subparagraph 12) of Article 138 of the Political Constitution to be ratified by the National Assembly".

[235] NCM, Annex 65. Political Constitution of Nicaragua, Article 1: "Independence, sovereignty and national self-determination are irrevocable rights of the people and the foundation of the Nicaraguan nation." In conformity with Article 182, "The Political Constitution is the fundamental law of the Republic; all other laws will be subordinate to it. No law, order, treaty or other arrangement that opposes or alters the Constitution will be valid."

[236] NCM, Annex 68. Resolution of the Republic of Nicaragua's National Assembly on the Joint - Communiqué Cuadra – Lizano, 30 July 1998. Ordinary Session # 5. Managua, 18 August 1998.

3.2.13 Finally, it must be noted that, contrary to what Costa Rica seems to imply[238], the exchange of letters of 28-29 June 2000[239] can certainly not be analysed as a binding agreement between the Parties. As noted in the subsequent letter of the President of Costa Rica to his Nicaraguan counterpart on 29 July 2000[240] these were pure "demonstrations of willingness" ("*manifestaciones de voluntad*") which proved impossible to be put in practice and, in his letter of 3 August 2000[241], in turn, the President of Nicaragua reiterated that such an arrangement required "the concurrence of other Powers of the State, in accordance with our internal legislation" ("*concurso de otros Poderes del Estado, en consonancia con nuestra legislación interna*").

3.2.14 It can however be noted that throughout their exchange of correspondence in the year 2000[242], both Heads of States made extremely clear that the Treaty of Limits of 1858 and the award of 1888 were "the instruments that define the legal framework for the respective rights" [243] of both Parties, and "that since 1888 nothing has occurred to change this legal status"[244].

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[237] NCM, Annex 65.
[238] CRM, p. 40, para. 3.38.
[239] CRM, Vol. 3, Annex 64 and 65.
[240] CRM, Vol. 3, Annex 66.
[241] CRM, Vol. 3, Annex 67.
[242] See CRM, Vol. 3, Annexes 64 to 67.

Section 3.3
General International Law

3.3.1 At the same time, these statements make crystal clear that general international law only plays an ancillary role in the present dispute.

3.3.2 It must however be noted that, while in principle acknowledging that the 1858 Treaty of Limits as interpreted by the Cleveland Award applies in the present case, Costa Rica endeavours to qualify this acquiescence and to limit this application. She does so in particular in an "Appendix A" [245] appended to her *Memorial*, where it explains at some length that, as an "international river", the San Juan River is subject to the application of "international law rules relative to navigation on international waterways"[246].

3.3.3 In a very wide perspective, Nicaragua can accept that, since "the notion of the 'course of [a] river' covers a range of possibilities: a boundary on either bank or a boundary somewhere within the river"[247], the San Juan river, the right bank of which belongs to Costa Rica, includes an international element. However, Costa Rica does not challenge that the river itself entirely belongs to Nicaragua: "Costa Rica at all times since the entry into force of the Treaty of Limits has recognised that the northern bank, the waters and the bed of the San Juan belong to Nicaragua"[248]. In this respect, the San Juan indisputably is a Nicaraguan national river to which Nicaragua's full sovereignty applies, with the only limitations provided for in the 1858 Treaty of Limits. In other words, the basic principle of international law which applies in the present case is the territorial sovereignty of Nicaragua on the waters and the bed of the river.

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[243] CRM, Vol. 3, Annex 65. Letter of the President of Nicaragua to the President of Costa Rica, 29 June 2000.

[244] CRM, Vol. 3, Annex 66. Letter of the President of Costa Rica to the President of Nicaragua, 29 July 2000.

[245] CRM, pp. 149-157. The very fact that this point is developed not in the *Memorial* itself but in an Appendix shows the discomfort of Costa Rica with this dubious argument.

[246] CRM, p. 155, para. A19.

[247] ICJ, Chamber, Judgment of 12 July 2005, *Frontier Dispute (Benin/Niger)*, para. 72.

3.3.4 The decisive element is that "the rights and obligations of both riparian States with regard to the San Juan are specificaily regulated by international instruments"[249], that is the Jerez-Cañas Treaty of 1858 and the Cleveland Award. In this measure only, the right of territorial sovereignty belonging to Nicaragua over the San Juan river "is not absolute, but is subject to the restrictions imposed by the treaty itself"[250] – and by that Treaty only.

3.3.5 It cannot therefore be accepted that "general international law rules relative to navigation on international waterways are also applicable"[251]. Once again, the applicable principle of general international law is that of Nicaragua's territorial sovereignty, with the restrictions provided in the Treaty of Limits.

3.3.6 The situation is quite different from that prevailing in the case concerning the *Territorial Jurisdiction of the International Commission of the River*

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[248] CRM, p. 149, para. A4.
[249] CRM, p. 152, para. A9.
[250] CRM, Vol. 2, Annex 21, p. 160. Central American Court of Justice, 30 September 1916, Opinion and Decision of the Court.
[251] CRM, p. 155, para. A19.

Oder before the PCIJ[252]. In the first place, the Oder River was, without any restriction, a truly international river and was declared such by Article 331 of the Treaty of Versailles. And, in the second place, the Court found a *confirmation* of this character in general international law[253]. While, in the present instance, Article VI of the Treaty of Limits very clearly proclaims that "[t]he Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan from its outlet from the lake until it empties into the Atlantic"[254]; the remaining part of this Article provides for the exceptions to this principle, that is, "free navigation", not in general, but "with articles of trade [*con objetos de comercio*]" exclusively[255].

3.3.7 Consequently, whether the Treaty expands or limits the rights and obligations belonging respectively to one or the other riparian State under general international law does not matter: the law applicable to the present dispute is not the general international law concerning navigational rights on international waterways but the legal consequences stemming from the cardinal principle of the Nicaraguan territorial sovereignty over the waters and the bed of the San Juan River with the exception of the limited rights of navigation over the river conferred to Costa Rica by the 1858 Treaty of Limits.

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[252] See CRM, p. 151, para. A8, or pp. 155-156, para. A20.

[253] PCIJ, Judgment, 10 September 1929: "*The actual wording of Article 331* shows that internationalization is subject to two conditions: the waterway must be navigable and must naturally provide an access to the sea. These are the two characteristics … by which a distinction has for a long while been made between the so-called international rivers and national rivers". (Series A, N° 23, p. 25 – italics added).

[254] CRM, Vol. 2, Annex 7, pp. 54-60. Jerez-Cañas Treaty, 15 April 1858.

[255] For a fuller discussion of this point, see below, NCM, Chap. 2, para. 2.1.63, *passim*.

3.3.8 *Mutatis mutandis*, this situation may be compared with that of a right of passage of States on the territory, or within the territorial sea, or in an international canal in the territory of another State. As the Permanent Court noted in the ***Wimbledon*** case: "… the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one dispute she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation in case of doubt, of the clause which produces such a limitation"[256]. Similarly in the present case, "[t]he Court is here dealing with a concrete case having special features"[257] resulting from the right of navigation recognized to Costa Rica on the San River by the Jerez-Cañas Treaty. This right, although strictly qualified, limits the exercise by Nicaragua of the rights deriving from her territorial sovereignty over the river, calling for a restrictive interpretation in case of doubt as to its extent and scope[258].

3.3.9 Under these conditions, Costa Rica is not entitled to invoke, as it abundantly does[259], provisions of other treaties concerning other rivers. "[T]hese arguments, drawn from independent provisions and diplomatic negotiations, cannot modify the conclusion which [can be] reached by means of a direct interpretation of the provisions applicable in the particular case…"[260]. The questions raised by the Parties in the present case must be determined solely by the interpretation and application of the 1858 Treaty of Limits[261].

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[256] Judgment of 17 August 1923, Series A, N° 1, p. 24.

[257] ICJ, Judgment, 12 April 1960, *Right of Passage over Indian Territory, ICJ Reports* 1960, p. 44.

[258] See also *ibid.*, pp. 45-46; for more comments, see above, Chap. 2, para. 2.1.65-2.1.66.

[259] See e.g.: CRM, pp. 151-152, paras. A8-A10, p. 153, para. A13, pp. 153-154, paras. A15-A16, pp. 155-156, para. A20.

[260] PCIJ, Judgment, 10 September 1929, *Territorial Jurisdiction of the International Commission of the River Oder*, Series A, N° 23, p. 30.

3.3.10 This, of course, does not mean that other norms and principles of general international law do not apply. Indeed, relevant rules of general international, and especially "secondary" rules of international law, do apply as far as they do not contradict the relevant provisions contained in the 1858 Treaty as interpreted by the 1888 Cleveland Award. Therefore, it will be apparent that general international law applies to incidental questions, not to the core issues of the case.

CONCLUSION

3.3.11 In the present Chapter, Nicaragua has shown that:

(1) The 1858 Treaty and the Cleveland Award are the only instruments relevant for establishing the situation of the San Juan River.

(2) Other instruments invoked by Costa Rica, are of little or no relevance in the present case since they are either not legally binding upon the Parties or bear upon different subject matters.

(3) Similarly, the general rules and principles relating to international rivers do not apply as they are set aside by the precise and comprehensive rules provided for in the 1858 Treaty as interpreted by the Cleveland Award; and

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[261] See PCIJ, Judgment, 28 June 1937, *The Diversion of Water from the Meuse*, Series A/B, N° 70, p. 16.

(4) The other rules and principles of general international law can only play a role in the present case inasmuch as they do not contradict these instruments.

CHAPTER 4

NICARAGUA HAS NOT BREACHED COSTA RICA'S TREATY RIGHT OF NAVIGATION

Section 4.1

Costa Rica's Right of Free Navigation under the Jerez - Cañas Treaty

INTRODUCTION

4.1.1 Let us recall again the provisions of Article VI in the Jerez-Cañas Treaty:

> "The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan from its outlet from the lake until it empties into the Atlantic; but the Republic of Costa Rica shall have perpetual rights, in the said waters; of free navigation from river's mouth to three English miles below Castillo Viejo for the purposes of commerce (con objetos de comercio), whether with Nicaragua Nicaragua or to the interior of Costa Rica, by way of the rivers San Carlos or Sarapiqui or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic. The vessels of both countries may indiscriminately approach the shores (atracar) of the river where the navigation is common to both, without the collection of any class of impost unless so established by the two Governments."[262]

4.1.2 There is no controversy as to the geographical area where Costa Rica enjoys her right of free navigation with articles of trade. The Parties agree that such right may only be exercised in the part of the San Juan de Nicaragua River comprised from its mouth in the Atlantic to a point three

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[262] CRM, Vol. 2, Annex 7, p. 57. See NCM Introduction para.4.

English miles below Castillo Viejo[263]. Thus, Nicaragua will not dwell upon that point.

4.1.3 However, based on Article VI of the Jerez-Cañas Treaty of Limits, Costa Rica claims to have an unlimited, autonomous and absolute right to navigate that sector of the San Juan de Nicaragua River, asserting that Nicaragua violates the Treaty by impeding Costa Rica's exercise of this right. The *Memorial* goes as far as affirming that *"any limitation imposed upon navigation that by right is 'free' constitutes a denial of that right."*[264]

4.1.4 Nicaragua entirely rejects both the premise and its conclusion. Costa Rica, through a self serving interpretation of Article VI, has come to the Court seeking to obtain by adjudication what she has been unable to achieve through negotiations, that is, a revision of the Treaty and of the Cleveland Award.

4.1.5 When evaluating Costa Rica's many claims of navigational and related rights on the San Juan de Nicaragua River, it is important to bear in mind certain fundamental points:

a. First, the Jerez-Cañas Treaty is a single undertaking that must be read in its entirety. It effected a *quid pro quo*: Nicaragua relinquished the Nicoya/Guanacaste region and the Colorado River to Costa Rica in exchange for Costa Rica's recognition of full sovereignty of Nicaragua over the San Juan River, subject only to a narrowly-defined right of navigation by Costa Rica with articles of trade.

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[263] See CRM, para. 4.02: "There is no dispute between the parties as to the geographical scope of the rights of navigation recognized to Costa Rica by the Treaty of Limits". See Note of the Ministry of Foreign Affairs of Costa Rica of 12 August 1998, CRM, Vol. 3, Annex 50; Notes of the President of Costa Rica of 28 June and 29 July 2000, CRM, Vol. 3, Annexes 64 and 65.

[264] CRM, para. 4.09.

b. Second, to ensure that the exchange was fair and that Nicaragua would have full competence to arrange for the construction and operation of an inter-oceanic route, the 1858 Treaty provided that the border between the two countries would follow the right bank of the San Juan River up to a point three miles downstream of Castillo Viejo, leaving the entire river in Nicaraguan territory and subject to her full sovereignty (Article II); it also stressed that Nicaragua had "exclusive dominion and supreme control" ("*exclusivamente el dominio y sumo imperio*") over the waters of the San Juan (Article VI). Given that the river is part of Nicaraguan territory and as such is subject to her sovereignty, the recognition that Nicaragua enjoys "exclusive dominion and supreme control" over it serves chiefly to emphasize the very limited nature of any rights that could be enjoyed by Costa Rica and that these must be consistent with Nicaragua's sovereignty. This is particularly true since Costa Rica's right to navigate with articles of trade is provided for in the same article of the Treaty that stresses Nicaragua's "exclusive dominion and supreme control" over the waters of the river. It is also true, *a fortiori*, of the panoply of rights alleged by Costa Rica to navigate on the San Juan with public, armed vessels, in contravention of Nicaragua's "exclusive dominion and supreme control" over the waters of the river.

c. And third, since at least the 1880s, Costa Rica has been attempting to enlarge the clearly circumscribed rights accorded to her under the 1858 Treaty to navigate on the San Juan de Nicaragua River.[265] It has in effect acted as if the boundary lay *in* the river rather than on its right bank. While this may be the more usual situation with regard to international watercourses generally, as Costa Rica stresses,[266] there were good reasons for delimiting the boundary between Nicaragua and Costa Rica in this way, as has been seen. From the beginning, Nicaragua has protested Costa Rica's efforts to increase the navigational rights granted by the 1858 Treaty. For example, on 5 June 1886, Nicaragua's Minister of Foreign Affairs wrote to his Costa Rican counterpart that the Costa Rican "government's disposition that a national steamer navigate the waters of the San Juan authorizes an act not granted by [the 1858] treaty, which in Article 6 reserves for this Republic, exclusively, the dominion and sovereignty over its waters, conceding to Costa Rica nothing more than free navigation with articles of trade..."[267] Yet some one hundred fifty years after the conclusion of the Jerez-Cañas Treaty Costa Rica still seems to have great difficulty in accepting Nicaragua's sovereignty over the entire river. This is seen not only in the repeated attempts to enlarge her navigational rights but also in statements in the *Memorial* such as the following one, referring to delimitations in which the border follows one bank of a contiguous watercourse as in the case of the San Juan: "The general drawbacks of this method of delimitation are such that in some cases, States agreed to modify such early delimitations, to replace them with the *thalweg* or the median line."[268] Be this as it may, there is no ground for such a modification of the boundary as delimited by the 1858 Treaty; indeed, the circumstances resulting in the delimitation of the boundary between the two countries in the way it was agreed have not changed in any way.

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[265] See the discussion of the incident (above in Chap. 3 paras. 3.1.33-3.1.45) in 1886 involving navigation by Costa Rica on the San Juan River with a national customs steamship.

[266] CRM, Vol. 1, Appendix A, para. A5.

[267] NCM Vol. 3, Annex 28. Note of 5 June 1886.

4.1.6 In the foregoing chapter it has been established that Costa Rica's right of free navigation, according to Article VI of the Jerez-Cañas Treaty, can only be conceived and exercised in the natural and inevitable framework of the sovereignty that corresponds to Nicaragua over the entire watercourse and her exclusive "dominion and supreme control" over the San Juan River in the terms used in the same provision.

4.1.7 The purpose of this section is to further highlight that this right of free navigation is limited from a material standpoint. It is a right of navigation *"with articles of trade"* through the rivers situated on its right bank, which appertain to this Republic.

A. A RIGHT OF *FREE* NAVIGATION, YES, BUT WITH *ARTICLES OF TRADE*

4.1.8 In her *Memorial*, Costa Rica attempts to blow up the "perpetual right of free navigation" with articles of trade accorded her in Article VI of the 1858 Treaty through references to inapposite international instruments.[269] "Freedom of navigation" cannot have an objective, autonomous meaning that overrides specific limitations on navigational rights provided for in the same provision that grants rights of free of navigation. Yet this is what Costa Rica in effect argues by focusing on the Treaty's grant of the right of free navigation and ignoring the accompanying restriction of that right to navigation with articles of trade.

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[268] CRM, Vol. 1, Appendix A, para. A5.

[269] CRM, paras. 4.13-4.16.

4.1.9 The language of Article VI relating to "freedom of navigation" that is relevant for present purposes reads as follows: "The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan …; but the Republic of Costa Rica shall have perpetual rights, in the said water; of free navigation *[con objetos de comercio]….*"[270] . It is the latter restriction – that navigation can only be "with articles of trade" – that Costa Rica conveniently leaves out, in her overall conception of her navigational rights.

4.1.10 In an effort to bolster her argument, the effect of which is that her rights of navigation on the San Juan are virtually unrestricted, Costa Rica cites various definitions of "free" and "freedom of navigation". After quoting definitions of the adjective "free" from contemporary dictionaries, Costa Rica reaches the breathtaking conclusion that: "It follows that any limitation imposed upon navigation that by right is 'free' constitutes a denial of that right."[271] This may be true of a general right of free navigation that is subject to no restrictions in the instrument creating it. It is quite another matter when the right granted is itself a limited one, as is the case of Costa Rica's right under Article VI. Thus Costa Rica's interpretation not only takes the grant of "free navigation" entirely out of the context by focusing exclusively on a part of the right ("free navigation" vs. "free navigation … *with articles of trade*"); but also detaches it from the greater context of the sovereign rights of Nicaragua in her river, out of which the limited right of free navigation with articles of trade is eked out. The doctrinal and practical difference between a right of "free navigation" and a right to navigate only with articles of trade emerges clearly from an examination of the very sources cited by Costa Rica on the meaning of "freedom of navigation".

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[270] CRM, Vol. 2, Annex 7, p. 57.

[271] CRM, para. 4.09. That the word "free" does not necessarily connote an absolute and unrestricted right has been recognized by the Costa Rican Supreme Court in a decision interpreting the expression "freedom of commerce" in Article 46 of Costa Rica's Constitution. The Court declared: "The exercise of the freedoms established in the Consritution is not absolute and may be subject to regulation and even restrictions." The Court later stated: "The freedom of trade, consecrated in Article 46 of the Constitution, is not a subjective right of an unrestricted or absolute character given that, like all laws, it is subject to regulations or limitations of general interest…." (NCM, Annex 64).

4.1.11 The first of these is the judgment of the Permanent Court of International Justice in the *Oscar Chinn* case.[272] That case involved a British citizen, Oscar Chinn, who in 1929 established a river transport and ship-building and repairing company in what was then the Belgian Congo. As the Court pointed out, the U.K. "never contended that the impugned measures [adopted by the Colony] constituted an obstacle to the movement of vessels,"[273] only that they produced a "*de facto* monopoly"[274] in favor of a company controlled by Belgium. Thus, freedom of navigation, per se, was not before the Court. However the Court did, in passing, address the meaning of this concept under the provisions of the 1919 Convention of Saint-Germain-en-Laye[275], which is no longer valid,[276] that dealt with navigation on the Congo River. In the passage quoted by Costa Rica, the Court stated: "According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers."[277] It will be recalled that this definition referred to navigation by vessels of European powers on the rivers of a colony. Their right to navigate was subject to no restriction akin to the one involved in this case and again, importantly, the rivers involved were those of colonies, not sovereign states.[278] Thus the difficulty with using sweeping definitions like the one in *Oscar Chinn* is that they do not take into account the relevant context or specific restrictions provided for by treaty. Further evidence of the latter is the Permanent Court's inclusion in its broad definition of "freedom of navigation" the freedom "to transport... passengers" – something that would never have been agreed to by a Nicaraguan Government well aware that the most lucrative use of the River for Nicaragua was the transport of passengers, as attested by the contracts for this purpose detailed in Chapter 1, Section 3 above, and ever mindful of the need to have exclusive authority over the transport of passengers on the San Juan in order to conclude agreements relating to the prospective inter-oceanic route. When read against the background of these historical facts and of the 1858 Treaty's restriction of Costa Rica's rights to navigation with articles of trade, what the Permanent Court had to say about freedom of navigation was not at all inconsistent with the rights under the 1858 Treaty enjoyed by Costa Rican vessels carrying articles of trade. However, the Permanent Court's definition cannot be read – as Costa Rica purports that this Court should do – to enlarge Costa Rica's navigational rights beyond those granted by the 1858 Treaty.

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[272] Judgment of 12 Dec. 1934, Great Britain/Belgium, PCIJ, Ser. A/B, No. 63, Ser. C, No. 75.

[273] *Ibid.*, p. 83

[274] *Ibid.*, p. 81.

[275] Convention of Saint-Germain-en-Laye, 10 Sept. 1919, Martens, 3rd ser., p. 691.

[276] See, e.g., Strategies for Crime Prevention and Control, Particularly in Urban Areas and in the Context of Public Security, Measures to Prevent Trafficking in Children, Report of the Secretary-General, para. 60, U.N. Doc. E/CN.15/1997/12, 28 Feb. 1997.

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[277] CRM, para. 4.13, Oscar Chinn, Judgment, PCIJ, Series A/B, N 63 (1934), 83.

[278] This fact is brought home by Article 1 of the 1885 Act of Berlin concerning freedom of trade, which is incorporated into the Convention of Saint-Germain by Article 1 thereof, and which is subject to the following "reservation" articulated in its last paragraph: "...in the territories belonging to an independent sovereign State this principle [of freedom of trade] shall only be applicable in so far as it is approved by such State." Convention of Saint-Germain-en-Laye, 10 Sept. 1919, Martens, 3rd ser., p. 691.

4.1.12 The second source cited by Costa Rica on the meaning of "freedom of navigation" is Article XIV of the well known Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966.[279] This definition, of "free navigation", broadly follows that of the Permanent Court in the *Oscar Chinn* case, by which it was inspired.[280] Its use to interpret Costa Rica's rights of navigation on the San Juan River accordingly suffers from the same problems identified in the preceding paragraph with respect to *Oscar Chinn*: it is a general definition which is subject to derogation by a *lex specialis*, in this case, the 1858 Treaty. The only vessels entitled to such "free navigation" are those carrying articles of trade. Therefore, as with the definition of the Permanent Court in *Oscar Chinn*, the reference in the Helsinki Rules to the "freedom to transport....passengers" must give way to the specific provisions of the Jerez-Cañas Treaty. Costa Rica enjoys the rights of "free navigation" identified, but only as to boats carrying articles of trade.

4.1.13 Whilst dealing with the Helsinki Rules it is useful to recall one of its provisions which is not quoted by Costa Rica:

> "The rules stated in this Chapter are not applicable to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any other form of public authority."[281]

This rule would presumably exclude navigation by the vessels of the revenue service which the Cleveland Award permitted under carefully defined circumstances, and would clearly prohibit navigation by boats used to re-supply border posts and to transport personnel to and from those posts. The quoted provision has a counterpart in the updated version of the Helsinki Rules, the so-called "Berlin Rules" of 2004, and entitled "Exclusion of Public Vessels." That provision reads: "Freedom of navigation does not apply to the navigation of warships or of a government vessel used for non-commercial purposes except by agreement of the States concerned."[282] Thus, this respected effort at codification[283] indicates that public vessels enjoy no right to freedom of navigation under general principles of international law. As has been seen (Chapter 1, Section 3, above), Costa Rica also has no such right under the 1858 Treaty. Thus even the authorities cited by Costa Rica serve to emphasize that Costa Rica has no rights of navigation on the San Juan with any kind of public vessel except those mentioned in the *Second* part of the *dispositif* in the Cleveland Award, and only under the very limited circumstances spelled out there.

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[279] International Law Association, *Report of the Fifty-Second Conference, Helsinki, 1966*, p. 484, at p. 507 (1966).

[280] *Ibid.*, Article XIV, *Comment*, at p. 508, quoting from *Oscar Chinn*.

[281] *Ibid.*, Art. XIX.

4.1.14 After setting forth the passages from *Oscar Chinn* and the Helsinki Rules just referred to, Costa Rica concludes: "Clearly, a broad interpretation has been adopted."[284] This statement is typical of Costa Rica's tactic of over-generalization; it is of little assistance to the Court in the present case. In fact, careful examination of Latin American practice and doctrine have concluded that there is no general right of freedom of navigation in that region, in the absence of special agreement. Thus Lucius Caflisch, in his

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[282] Berlin Rules on Water Resources, Art. 48, International Law Association, Berlin Conference (2004), available at http://www.asil.org/ilib/WaterReport2004.pdf, accessed 10 December 2006.
[283] For example, Costa Rica claims "general international law" status for Article XIII of the Helsinki Rules. CRM, Appendix A, para. 21
[284] CRM, para. 4.15.

Hague course, after reviewing Latin American treaties, doctrine, and cases, including the well-known *Faber* case,[285] concludes as follows:

> "La sentence arbitrale en l'affaire *Faber* met en relief l'opposition entre la doctrine de la libre navigation, création de l'Europe du XIX^{e} siècle, et la conception latino-américaine, qui fait dépendre la navigation de la volonté de l'Etat riverain ou des Etats riverain. Cette conception…consistait à limiter la libre navigation aux trajets sans transbordement vers la mer ou en provenance de celle-ci.
>
> La doctrine, quant à elle, semble à peu près unanime: en Amérique latine, il n'existe pas de liberté de navigation en l'absence de concession unilatérale ou de disposition conventionnelle."[286]

4.1.15 Even if it is accepted that "a broad interpretation" of the principle of freedom of navigation "has been adopted", we are not told whether Costa Rica believes that such an interpretation forms part of general international law. Even if it does, which is by no means certain given the Latin American practice just referred to, that "broad interpretation" would apply only to the extent it was not derogated from by treaty; it hardly qualifies as *jus cogens*.

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[285] Award of 1903 rendered by Henry M. Duffield, umpire, appointed by a German-Venezuelan Mixed Claims Commission, under Agreement of 13 Feb. 1903, 10 U.N.R.I.A.A. p. 438. The case involved a complaint by Germany that Faber, one of its nationals, had suffered injury from Venezuela's suspension of navigation on the Venezuelan portion of the international river system of the Catatumbo and Zulia Rivers, which have their sources in Colombia. In supporting Germany's claim, the German member of the mixed commission relied on principle of freedom of navigation. The umpire rejected Germany's claim.

[286] Lucius Caflisch, *Règles générales du droit de cours d'eau internationaux*, 219 *Recueil des cours* (1989-VII) p. 9, at p. 125.

B. A RIGHT OF NAVIGATION RESTRICTED TO ARTICLES OF TRADE (OBJETOS DE COMERCIO)

4.1.16 Costa Rica resorts, in her Application and *Memorial*, to different stratagems with the aim of transforming the limited right of navigation into a master key that would allow her in fact complete freedom to navigate that sector of the San Juan de Nicaragua River indicated in the 1858 Treaty. To that effect, Costa Rica has played with the meaning of the phrase "*with objects of commerce*" or "*with articles of trade*" in order to interpret it as "*for purposes of commerce*" or "*with the object of commerce*".

4.1.17 It is worth highlighting that in the abundant diplomatic correspondence exchanged between Nicaragua and Costa Rica, logically written in the Spanish language, the customary reference was to "objects of trade" (objetos de comercio)[287]. The attempts to change the express wording of Article VI of the Jerez-Cañas Treaty, are of recent origin[288], and serve to unveil the objectives pursued by the Applicant.

4.1.18 The expression "*purposes of commerce*" is used by President Grover Cleveland in the second Article of the Award of 2 March 1888[289]. President Cleveland redrafted this article in his own handwriting and was careful to place the expression within quotation marks[290]. This can only be understood to mean that the use of the phrase in English did not alter its meaning in the original Spanish text. This meaning was in any case not in dispute at that time by the Parties.[291] Thus, the Arbitrator refers, as could not be otherwise, to "purposes of commerce" accorded to her (Costa Rica) *in said Article* (VI)" of the Treaty (emphasis added)[292], no more.

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[287] The references to "objects of trade" are numerous in the diplomatic notes and annual reports of the Ministry of Foreign Affairs of Costa Rica, even when the second Article of the Cleveland Award is translated to Spanish, for example, in the Note of 23 March 2000. (NCM Annex 43) To the same effect see the judgment of the Constitutional Chamber of the Supreme Court of Costa Rica of 14 August 2001 (NCM, Annex 66).

[288] In the Note sent by Costa Rican President Miguel Angel Rodriguez on 29 July 2000. CRM, Vol. 3, Annex 66.

[289] CRM, Vol. 2, Annex 16.

4.1.19 The debate here, in the English language, is the interpretation of a provision of a treaty drafted and authenticated in the Spanish language, and not its translations, more or less felicitous, more or less interested. Arbitrator Cleveland never intended to make a judgment on something that was not before him. He was well aware that if he had done so, his *ultra petita* decision would have been null.

4.1.20 What are the "*objects of commerce*" (*articles of trade*) with which Costa Rica can navigate?

4.1.21 Nicaragua is not a party to the Vienna Convention, but the rules of interpretation of Articles 31 and 32 are an expression of customary international law rules, as the Court has affirmed on various occasions (for example, recently in *Sovereignty over Pulau Ligitan and Pulau Sipidan*,

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[290] NCM, Annex 72. Draft award prepared Secretary of State George Rives, in accordance to Article 5 of the Román-Esquivel Cruz Convention of 24 December 1886.
[291] Let us recall that Costa Rica had no questions regarding the interpretation of the Treaty, considering that according to the Rives Report "*The Government of Costa Rica did not communicate any corresponding statement and now declares that it finds nothing in that treaty which is not perfectly clear and intelligible.*" Regarding the basis of the validity of the Jerez-Cañas Treaty, the only points of debate were those concerning navigation with vessels of war and of the revenue service, and the eleven points of doubtful interpretation submitted by Nicaragua.
[292] See NCM, Chap. 2.

2002[293], and *Legality of Use of Force*, 2004).[294] On this question, see further Chapter 2, paragraphs 2.1.8 to 2.1.12.

4.1.22 In 1898 Costa Rica, today a party to the Vienna Convention, flooded Arbitrator Alexander with such a torrent of doctrinal quotations on the rules of interpretation of the treaties that in his *Award No. 4* [295] he could only echo these by concluding that: "All concur that words are to be taken as far as possible in their first and simplest meanings – 'in their natural and obvious sense, according to the general use of the same words'…"[296]

4.1.23 What then are the *objetos de comercio* (articles of trade/purposes of commerce) to which reference is made in Article VI of the Jerez-Cañas Treaty? The terms of a treaty, as stated in Article 31.1 of the Vienna Convention, must be interpreted in principle according to their *ordinary or usual sense* in the *context* of the treaty. It is this last clarification that allows the interpreter to choose between the different meanings of each term.

4.1.24 Article 31.4 adds that "a *special* meaning shall be given to a term if it is established that the parties so intended." The meaning given to a term will be *special* when it does not match its ordinary meaning in its own context. But nobody claims that this is our case.

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[293] ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, judgment of December 17, 2002, para. 37

[294] ICJ, *Legality of use of Force* (Serbia and Montenegro v. Belgium), Judgment of 15 December 2004, para. 100

[295] NCM, Annex 73.

[296] *Ibid*, Fourth Award of July 26, 1899 (H. La Fontaine, *Pasicrisie internationale 1794-1900. Histoire documentaire des arbitrage internationaux*, 1902, reprinted 1997, M. Nijhoff, The Hague, pp. 535-537). According to Article II of the Matus-Pacheco Treaty, 27 March 1896 (see Ch. 1, para. 1.3.39), the President of the United States named the engineer Edward P. Alexander to decide the points still in dispute between the parties, on the demarcation of the boundary. CRM, Vol. 2, Annex 17.

4.1.25 If we turn, in first place, to the maximum grammatical authority of the Spanish language, we will note that the word "objeto" (*object*) means, according to the Royal Spanish Academy Dictionary (tenth edition, 1852, in use in 1858), "*lo que se percibe con alguno de los sentidos o acerca de lo cual se ejercen*" ("that which is perceived by one or more of the senses, or with respect to which they are exercised") and only later "*el término o fin de los actos de las potencias*" ("the conclusion or end of the act of the powers", "*el fin o intento a que se dirige o encamina alguna cosa*" (the purpose or end to which a thing is directed or aimed."[297]

4.1.26 These usages have not changed substantially since then.

4.1.27 If the term *objeto* is appropiate for referring to a matter, good or thing, and also to a purpose or aim, the same cannot be said of the plural form of the word, namely: *objetos*. Although the Royal Spanish Academy Dictionary does not offer a direct and express definition of this usage, it is entirely beyond the normal and usual use of the Spanish language to speak of the *objetos* of a treaty or science when referring to its purposes, aims or objectives. On the other hand, the term *objetos* is used to identify things, goods, merchandise and matters dealt with by a science or treaties, if used in the plural.

4.1.28 A literal translation of the phrase "con objetos de comercio" into English is "with objects of commerce". The word "object" in English and "objeto" in Spanish have the same Latin root of "objectus" and basically have the same meaning. Thus, the phrase in English "with commercial objects" (or with objects of commerce) would perhaps not be the most felicitous use of the phrase but it could never be construed to mean "with object of commerce" or of linguistic necessity with an added "the": "with *the* object of commerce". Equally in Spanish "con objetos de comercio" cannot be construed to mean "con objeto de comercio" in singular because this would imply not only eliminating the plural "s" in the original text, but would also have needed an accompanying "the" or "el" in Spanish: "con *el* objeto de comercio".

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[297] NCM, Annex 74.

4.1.29 If we follow the dictum of the Court in the cases of the *Rights of Nationals of the United States of America in Morocco* or the *South West Africa case* [298]and consider similar texts of the period, we inevitably would be drawn to the text used by the Congress of Vienna in 1815 for international rivers: that is, rivers that flow through more than one State. The San Juan is of course not an international River since it flows entirely within one country and besides is subject to a special Treaty Regime, but the texts of the almost coetaneous regulations of the European rivers must have been perfectly known by the Parties in 1858. Thus, if they wanted an ample freedom of navigation for commercial purposes why did not they use the more ample phrase of the Congress of Vienna that proclaimed navigation to be entirely free "sous le rapport du commerce", that is, for commercial purposes or objectives.

4.1.30 Is it possible that the Parties in 1858 understood that they were establishing a similar freedom of navigation with commercial purposes?

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[298] *Rights of Nationals of the United States of America in Morocco*. 1952. *ICJ Reports*, 1952, Judgment of 27 August 1952, pp. 186 ff.; too, *ICJ Reports*, 1966, *South West Africa (2nd phase)*, judgment of 18 July 1966, pp. 23-24, para. 16-18. Likewise, in referring to the agreement between the League of Nations and South Africa regarding the mandate over South-West Africa, the ICJ found that, "Any enquiry into the rights and obligations of the Parties must proceed principally on the basis of considering the texts of the instruments and provisions in the setting of their period". ICJ *Reports, 1966*, judgment of 18 July 1966, p. 23, para. 17.

Hardly likely! Less than a year previously on 6 July 1857 the Parties had entered into the Juarez-Cañas Treaty to which we have referred above in Chapter 2[299] and although it was not ratified, its non ratification was not due to any disagreement on the type of navigation, and thus it is an indisputable aid in the interpretation of the 1858 Treaty. This earlier Treaty stipulated in Article 5 that Costa Rica could freely use the waters of the San Juan to transport articles of trade (articulos de comercio).[300] Here we see exactly the type of navigation that was envisioned: it was circumscribed to objects of commerce (articles of trade) that were imported from outside the area and those articles that were exported also outside the area. It was not freedom for any type of navigation but only a more restricted freedom but nonetheless the freedom of navigation that was of crucial interest for Costa Rica at that time in which it had no other means of transportation for the merchandise coming and going from and to Europe and the United States.

4.1.31 The results of the text's exegesis is consistent with its context (Article 31.2 of the VCLT), in our case, the text of the Treaty as a whole[301] as well as its purpose. The Jerez-Cañas Treaty of Limits, as the name in its header indicates is a Treaty of Territorial Adjudication that "sets the limits" between the Republics of Nicaragua and Costa Rica. In the preamble[302], the treaty's objective is to "end the differences that have prevented the most perfect understanding and harmony that should prevail between them, for their common security and growth".

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[299] NCM, paras. 2.1.26, see also paras. 1.2.38, 1.2.41, 3.1.32.

[300] NCM, para. 1.3.8.

[301] As the PCIJ observed (*The Diversion of Water from the Meuse*) "the Treaty brought into existence a certain regime which results from all of its provisions in conjunction. It forms a complete whole, the different provisions of which cannot be dissociated from the others and considered apart by themselves" (Judgment of June 28th, 1937, Series A/B, fas. 70, p. 21).

[302] The preambles, notwithstanding the extent of the binding value that might be attributed to them, are especially important in the interpretation of the provisions of the text of the treaty. (see for instance, *Rights of Nationals of the United States of America in Morocco, ICJ Reports*, 1952, Judgment of 27 August 1952, p. 196; *Sovereignty over Frontier Land, ICJ Reports*, 1959, Judgment of 20 June 1959, pp. 221-222).

4.1.32 The consideration of the object and purpose of the treaty points to an interpretation that ensures the greatest effectiveness compatible with the ordinary meaning of the terms of the treaty within its context. It is unquestionably a matter of satisfying the ultimate aim sought by the parties within the limits of the provisions agreed upon. In no case can extensive interpretations be admitted that go beyond that which is expressed or necessarily implicit in the terms of the treaty, much less to feel inclined toward ideal solutions that the parties never had the intention to consent.

4.1.33 In exchange for Nicaragua giving up her rights over Nicoya that were solidly based on the principle of *uti possidetis iuris* of 1821, Costa Rica had to recognize that the entire course of the San Juan de Nicaragua River, as its name indicates, appertains to Nicaragua.

4.1.34 Given that the application of the *General Rule* of interpretation offers a perfectly clear and reasonable meaning of the Article VI of the Jerez-Cañas Treaty recourse to the *supplementary means of interpretation* mentioned by Article 32 of the Vienna Convention of Law of Treaties is not needed.

4.1.35 Within the unruly and turbulent history that the Central American Republics represented on the chessboard of the financial and strategic interests of the United States and Great Britain, associated with the construction of an inter-oceanic canal and the use of the river and lake as a rapid transit route for passengers traveling from the Atlantic to the Pacific after gold was discovered in California, Costa Rica endeavoured in the moments of Nicaragua's greatest weakness to seek to share her sovereignty over the San Juan river and even Lake Nicaragua. But having to abandon this aspiration, Costa Rica's other vital national aim was to secure for her products, mainly coffee, a way out to the Atlantic that would ensure faster and cheaper access to the European market, particularly Great Britain, which absorbed half of her production at a time when Costa Rica lacked ports on the Caribbean and her exports to Europe had to head for Cape Horn. This last is what the Jerez-Cañas Treaty granted to Costa Rica.

4.1.36 Any diplomatic document or preliminary treaty in the years prior to the Jerez-Cañas Treaty always bears relation to the transport of merchandise, fruits, products, commodities.[303]

C. EXCLUSION OF TRANSPORT OF PASSENGERS

4.1.37 The most lucrative business at the time of the signing of the Treaty of 1858 was by far the transport of passengers. Thus this transport of passengers as a commercial activity was, needless to say, carefully excluded from the right of navigation with articles of trade recognized by Article VI of the Jerez-Cañas Treaty.

4.1.38 It is important to underline that the exclusive right of navigation with passengers in the San Juan River is derived from Nicaragua's exclusive dominion and sovereignty as well as the right to grant concessions for the construction of a canal and for the transport of passengers through it. There is a juridical line inter-connecting these sovereign rights. It is equally important to underscore that the 1858 Treaty of Limits, leaves this issue out, based on the clear recognition by Costa Rica of Nicaragua's sovereign rights as explicitly expressed, for example, in the Transit as well as the Canal contracts that were recognized as validly granted and in force by Costa Rica under the Articles VII and VIII.

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[303] See the instruction to Oreamuno (instruction number 17th, 26 July 1838), NCM, Annex 87 and the Marcoleta-Molina Treaty (28 January 1854, art. 4). NCM, Annex 4.

4.1.39 In effect, Article VII of the Jerez-Cañas Treaty of Limits, sets safely aside

> "...obligations subscribed to, whether under political treaties or under contracts for a canal (canalizacion) or transit made on the part of Nicaragua before this present agreement..."[304]

4.1.40 The Contracts celebrated by Nicaragua turn out to be, without a doubt, very relevant as a basis for the exclusivity of navigating with passengers and the exclusive right of Nicaragua of granting concessions for the transit of passengers on the river. From the conclusion of the Treaty and the fact that third parties respected such Concessions one can deduct the exclusive nature of the right of Nicaragua to grant them.

4.1.41 This right was recognized by Costa Rica on numerous occasions. The first of these was when she accepted (Congressional Decree of 22 June 1852)[305] the Webster-Crampton Propositions of 30 April of the same year,[306] and later, in the Preliminary Marcoleta-Molina Treaty of 28

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[304] CRM, Vol. 2, Annex 7, p. 58.

[305] CRM, Vol. 6, Annex 199.

[306] Said Propositions stated (Article 3) that Costa Rica would have the right to navigate those rivers with sail vessels only; NCM, Annex 88. See also Obregón, Clotilde, *El Rio San Juan en la Lucha de las Potencias (1821-1860)*, San José, Costa Rica, UNED, at 143.

January 1854 (Articles 4 and 5).[307] It was always one of the elements present in any global agreement.

4.1.42 Subsequent to the conclusion of the Jerez-Cañas Treaty of Limits, Nicaragua subscribed the Zeledón-Rosa Pérez Convention of 1860 with associates and shareholders of the American Atlantic and Pacific Maritime Canal Company for the "establishment of an inter-oceanic way through the Nicaraguan isthmus." In this Convention the Government of Nicaragua granted "the exclusive right (...) to transport all kinds of passengers, luggage, chests, merchandise and properties by land or waters, by way of any ship, including steamships."[308]

4.1.43 Nicaragua granted such privileges in exercise of her sovereignty and her exclusive right to navigate the river with passengers. This can be seen in the wording of Article VII of the contract of 10 November 1863 signed by Luis Molina as Minister of Nicaragua in Washington and Francis Morris, president of the Central-American company, in which it was stipulated that: "the exclusive right of inter-oceanic transit for passengers, luggage, chests, treasures, cargo and articles of trade in general, by land or sea within the following limits: by way of water, said Company will have exclusive rights of navigation as part of the inter-oceanic traffic and only on that part from the San Juan river from the Atlantic through to bay of la Virgen in lake Nicaragua, or any other lacustrine port."[309]

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[307] NCM Annex 4 Applying the same measure, and Costa Rica excluded the right of steam navigation by Nicaraguans in the rivers under its sovereignty and tributaries of the San Juan River.

[308] Zeledon – Rosa Pérez Convention. Art. V, NCM, Annex 17.

[309] NCM, Annex 18. Luis Molina and Francis Morris Contract. Art. 7.

4.1.44 The same can be said about the Pellas Contract, ratified on 16 March 1877 where it states in Article 1 that: "The Government of Nicaragua grants to Mr. F.A. Pellas, partners and heirs, the exclusive privilege, for an eighteen year period, to navigate with steamboats the San Juan del Norte river and Lake Granada [lake Nicaragua]..."[310]

4.1.45 Nicaragua's exclusive of this exclusive right is also reflected in the Cardenas-Menocal Contract, granted to the Nicaragua Canal Association of New York on 23 March 1887[311]. This Contract grants the exclusive rights to excavate and operate a maritime canal through her territory between the Atlantic and Pacific Oceans.

D. THE RIGHT TO LAND AT ANY PART OF THE NICARAGUAN BANK

4.1.46 Costa Rica refers in her *Memorial*, to the right to land at any part of the banks of the River where navigation is common as a right which arises from Article VI of the Jerez-Cañas Treaty, associated to the right of navigation[312].

4.1.47 Nicaragua does not dispute such right, but points out that it can only be used for the enjoyment of Costa Rica's right to navigate with articles of trade, as expressed in Article VI of the Treaty, in that section of the River, from the Atlantic to a point three English miles below the Castillo Viejo.

4.1.48 The right to land does not entail freedom to trade anywhere along the route. The 1858 Treaty was not a free trade agreement. Furthermore, the exercise of this right cannot supersede or invalidate the intrinsic rights and duties of Nicaragua to regulate matters of health and security in her territory.

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[310] NCM, Annex 19, Pellas Contract.

[311] NCM Annex 20.

[312] CRM, paras. 4.118-4.120

Section 4.2
The right of Costa Rica under the Jerez-Cañas Treaty as interpreted in the Cleveland Award

A. INTRODUCTION

4.2.1 It has been shown in Section 1 of the present Chapter that Nicaragua has not breached, and indeed has fully respected, Costa Rica's rights under the Jerez-Cañas Treaty of 1858[313]. Since the 1888 Award by President Grover Cleveland interpreted that treaty and since it did not involve the question of the meaning of Costa Rica's right to navigate on the San Juan River with articles of trade ("*con objetos de comercio*"), it follows that with respect to navigation with articles of trade Costa Rica can have no greater rights under the Award than she has under the Treaty itself. As to the many other rights of navigation claimed by Costa Rica, these also find no support in the Cleveland Award, as will be shown in the present Section.

4.2.2 Specifically, this Section will show that Costa Rica offers no support, nor is there any basis, for her alleged right of protection of commerce and revenue control, nor is there any basis for her alleged right to "safeguard" the river, except under very limited circumstances, none of which is present. Costa Rica's alleged right to the re-supply of and transport of personnel to and from border posts, and "other related rights", are similarly without foundation, as shown in Chapter 5.

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[313] CM, Vol. 2, Annex 7, c) English translation: Nicaragua's version submitted to Cleveland.

B. COSTA RICA'S ALLEGED RIGHTS OF NAVIGATION FOR SPECIFIC PURPOSES

4.2.3 In Chapter 4 of her *Memorial*, Costa Rica devotes full sections to the following alleged navigational rights: Right of protection of commerce and revenue control (Section D); Rights and obligations to safeguard (*guarda*) the River and to contribute to its defence, as well as defence of the common bays (Section E); Re-supply of and transport of personnel to and from border posts (Section F); and Other related rights (Section G). The short answer to many of these allegations is that Nicaragua has not breached the rights in question because they do not exist. That Nicaragua has not breached Costa Rica's rights of navigation under the 1858 Treaty has been demonstrated in Sections 1 and 3 of the present Chapter. The present subsection will show that Nicaragua similarly has not breached any right of navigation Costa Rica enjoys under the interpretation of the Treaty in the 1888 Cleveland Award.

4.2.4 It should be emphasized at the outset that it is, in the first instance, the 1858 Treaty that governs the rights and obligations of the parties.[314] The parties never intended that President Cleveland be authorized to create new rights or obligations, and the arbitrator himself was careful not to do so. As has been seen, the questions put to him concerned the Treaty itself: its validity and its interpretation.[315] Therefore, if Nicaragua has not violated Costa Rica's navigational rights under the 1858 Treaty, she has also not violated them under the Cleveland Award. However, because that award, particularly in the *Second* paragraph of the *dispositif*, elaborates on the meaning of the Treaty, it is worth confirming that it provides no basis for the novel rights claimed by Costa Rica.

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[314] On this point see, e.g., Chap. 3, Sec. 1, above.

[315] See Articles I of the Convention of Arbitration of 24 December 1886, NCM, Annex 11 and Article VI, CRM, Vol. 2, Annex 14.

4.2.5 As has been seen in Chapter 3, Section 1, President Cleveland recognized only a bare minimum of navigational rights by Costa Rican public vessels in Nicaraguan territory, on the San Juan River. He began by finding that under the Treaty, Costa Rica "has not the right of navigation of the river San Juan with vessels of war..." In so deciding he rejected the following recommendation of George L. Rives:

> "The preliminary question of interpretation, as to the right of navigation of the San Juan by public vessels of Costa Rica, should, therefore, in my judgment, be answered by saying that the vessels of war and of the revenue service belonging to Costa Rica have the same privileges of navigating the River San Juan as are usually accorded in their territorial waters by civilized nations to the public vessels of friendly powers in time of peace, – but no other or greater privileges."[316]

4.2.6 Thus, while Rives recommended that public vessels of Costa Rica should have the "privilege" of navigating on the river, President Cleveland, no doubt influenced by the fact that under the Treaty the entire San Juan River was part of Nicaragua's sovereign territory, rejected all but the smallest vestige of the recommendation. He was content neither with the analogy to marine navigation, nor with even a mere "privilege" of navigation with vessels of war, nor with a general finding that Costa Rica may navigate on the San Juan with vessels of the revenue service. Instead, President Cleveland sharply restricted the circumstances under which navigation by such vessels would be permissible, as shown in Chapter 3, Section 1. Costa Rica could only navigate with such vessels on the San Juan when there was also navigation by Costa Rican boats with articles of trade, and further, only with such vessels "as may be related to and connected with" her enjoyment of the right to navigate with articles of trade, "or as may be necessary to the protection of said enjoyment."[317] President Cleveland thus kept Costa Rican revenue vessels on a very short leash indeed, demonstrating his reluctance to allow Costa Rica to navigate with public vessels of any sort on a wholly Nicaraguan river.

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[316] NCM, Annex 71. George L. Rives, Report to President Grover Cleveland, (Second), pp. 218-219 of handwritten version.

C. COSTA RICA'S ALLEGED RIGHT OF PROTECTION OF COMMERCE AND REVENUE CONTROL

4.2.7 But President Cleveland's obvious efforts to keep activities of Costa Rican public vessels on the San Juan to a bare minimum seem to have been lost on Costa Rica. Under the heading, "Costa Rica's right of protection of commerce and revenue control," Costa Rica states in her *Memorial*:

> "the perpetual right of free navigation is a State right and as such it is not limited to private vessels. Public vessels also enjoy this right. This was the position successfully upheld by Costa Rica before President Cleveland in 1888 and it is its position today."[318]

4.2.8 There is nothing in the 1858 Treaty or the Cleveland Award that supports this proposition. Costa Rica's only rights of navigation on the San Juan River are to navigation with articles of trade and the closely associated rights of navigation by revenue vessels specified in the Cleveland Award. It is of course conceivable, though it would seem highly unusual especially for the period involved, that Costa Rican public vessels would carry articles of trade – such as coffee, for example – to market or a shipping terminal via the San Juan River. But Costa Rica has not done this and there is neither any hint in the 1888 award that President Cleveland had such a role of public vessels in mind nor any such suggestion in the 1858 Treaty. Absent that, the only role left for public vessels is the extremely limited one carefully defined by President Cleveland.[319]

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[317] CRM, Vol. 2, Annex 16. Cleveland Award, *Second* paragraph of *dispositif.*

[318] CRM, para. 4.73.

4.2.9 President Cleveland's appreciation of Nicaragua's sovereignty over the San Juan and the effects thereof is also illustrated by his answers to two questions put by Nicaragua concerning points of doubtful interpretation of the 1858 Treaty. In points 4 and 5 of the *Third* paragraph of the *dispositif*, the arbitrator said:

> "4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the bay of San Juan del Norte from being obstructed; to keep the navigation of the river or port free and unembarrassed, or to improve it for the common benefit.
>
> 5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned."[320]

4.2.10 Here President Cleveland recognizes that Nicaragua's exclusive possession of the "dominion and supreme control of the waters of the river

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[319] As indicated in Chap. 3, Sec. 1, President Cleveland's statements about vessels of the revenue service in the Second section of his award is informed by the limitations described in the report of George L. Rives to the arbitrator. CRM, Vol. 2, Annex 16.

[320] Ibid. *Third* paragraph of *dispositif*, paras. 4 and 5

San Juan"[321] means not only that Nicaragua is responsible for the upkeep of her territory, but also that Costa Rica need not contribute to the expense of doing so, a point also recognized by George Rives.[322] He was doubtless sensitive to the fact that requiring Costa Rica to contribute to maintenance and related expenses might suggest that she had some rights in the river that she clearly did not possess.

4.2.11 Nicaragua's sovereignty over the San Juan River, and the historical considerations described in Chapters 1 and 3 explaining why the boundary was delimited in the way that it was, make this a special, even a unique case. Therefore the fact that other treaties concluded between South American countries in the 19th and early 20th centuries recognized "rights of navigation for public vessels of a neighbouring country…even extend[ing] to war vessels",[323] has no bearing on the present case. The treaty provisions cited by Costa Rica refer exclusively to warships, not to public vessels generally. Since President Cleveland decided that Costa Rica had no right to navigate on the San Juan with warships, these treaties have absolutely no relevance to the question before the Court. Moreover, the treaties themselves do not create the special kind of territorial regime that is established by the Jerez-Cañas Treaty.

4.2.12 Also of no present relevance is the practice of the United States in the 19th century with regard to the "revenue cutters" used to guard her coast.[324] As noted in Chapter 1, Section 3, by invoking this U.S. practice Costa Rica attempts to suggest that because U.S. Revenue Cutters that ply U.S. waters have certain characteristics, including armaments, Costa Rican revenue vessels wishing to sail in Nicaraguan territory, on the San Juan, have a right to be outfitted in like manner. This conclusion is a *non sequitur* and ignores entirely the special characteristics of the San Juan, a wholly Nicaraguan river, as well as the source of any rights of navigation of Costa Rica on that river, the 1858 Treaty. The chief point of interest regarding Costa Rica's description of nineteenth century U.S. revenue cutters is that it shows why President Cleveland was so careful to circumscribe tightly the navigational rights of Costa Rican revenue vessels: such ships can, and do, easily become ships of war.

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[321] CRM, Vol. 2, Annex 7, p.57.
[322] NCM, Annex 71. Report of George L. Rives (Second).
[323] CRM, para. 4.80.
[324] CRM, paras. 4.81-4.82.

4.2.13 Costa Rica also seeks to bolster her case for a right of her armed vessels to navigate on the San Juan by noting that Nicaragua argued in the Cleveland arbitration that Costa Rica's revenue cutters were "armed vessels, capable of enforcing their demands by force."[325] Costa Rica's argument continues:

> "But President Cleveland refused to assimilate those vessels of the revenue service to war vessels. Only the latter were declared to be excluded from the perpetual right of free navigation recognized by the Cañas-Jerez Treaty."[326]

4.2.14 This argument misses the point entirely. The entire passage from which the above excerpt from Nicaragua's argument was taken reads as follows:

> "Vessels of the revenue service are akin to vessels of war. While they have not all the means of aggression as the former, still they are armed vessels, capable of enforcing

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[325] *Ibid.*, para. 4.84. Costa Rica gives no reference for this quotation, but it appears to have been taken from the Reply of the Republic of Nicaragua submitted to H.E. Hon. President Cleveland, p. 49.

[326] CRM, paras. 4.84.

> their demands by force, and must be classed in the same category as vessels of war. Neither have the right, under a commercial license, to invade the territory, domain, or sovereignty of the Republic of Nicaragua."[327]

4.2.15 This passage affords a clear understanding of the fears of Nicaragua regarding the navigation in her territory of armed Costa Rican vessels. President Cleveland, clearly aware of the blurred line between warships and revenue vessels, crafted an ingenious solution. Rather than merely prohibiting the former and permitting the latter, which could have resulted in Costa Rican revenue vessels becoming the functional equivalent of warships (Costa Rica's description of U.S. Revenue Cutters demonstrates this[328]), the arbitrator prohibited navigation by warships and permitted navigation by revenue vessels, but only under extremely restrictive conditions,[329] conditions that would eliminate the possibility of revenue vessels evolving into, or being used as, the functional equivalent of warships. President Cleveland clearly would not have intended to issue an award that contained the seeds of its own destruction. Yet this would have been the case if Costa Rica's interpretation is correct: the award would have prohibited navigation by Costa Rican warships but permitted navigation by her "public armed vessels,"[330] which might well have been entirely undistinguishable from ships of war.[331] Such an interpretation of President Cleveland's award, which would give back with one hand what the other hand had taken away, would clearly make no sense. As Judge Weeramantry said in the *East Timor* case, "A time-honoured test of the soundness of a legal interpretation is whether it will lead to unreasonable, or indeed absurd, results."[332]

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[327] NCM, Annex 69. Reply of the Republic of Nicaragua submitted to H.E. Hon. President Cleveland, p. 49.

[328] CRM, paras. 4.81-4.82.

[329] These conditions are discussed in Chap. 3, Sec. 1.

[330] CRM, para. 4.79.

[331] Of course, as discussed in Chap. 2, in the exercise of its police power in its own territory Nicaragua would have the right to stop and examine any vessel of doubtful character to determine whether it conformed to the 1858 Treaty as interpreted in the Cleveland Award.

4.2.16 However, Costa Rica maintains that "Following the Cleveland Award, [it] continued to navigate with armed personnel on revenue cutters or other vessels on the lower part of the River and Nicaragua respected this right."[333] It should first be observed that Costa Rica has not introduced evidence to support the proposition that she had, since her first attempts in 1886, navigated on the lower San Juan with "armed personnel on revenue cutters or other vessels" up to the rendering of the arbitral award. Therefore, it is incorrect to state that any attempts she made to do so following the Cleveland Award were "continu[ations]" of past conduct.

4.2.17 In fact, strikingly, there is no record of any navigation on the lower San Juan by Costa Rican vessels of the revenue service after the incident in 1886 involving a Costa Rican customs steamship.[334] This speaks volumes about the need, or lack thereof, for Costa Rica to navigate with such vessels on the lower San Juan, which even today is populated only sparsely on both sides of the river. The commerce that takes place along the stretch of the river in which Costa Rica has the right to navigate with articles of trade is in fact akin to the trade of small local stores (*pulperias*, or "mom and pop" stores). This is confirmed by annual reports of customs offices in Costa Rica, which demonstrate that there does not exist any significant transport of merchandise by Costa Rica on the San Juan under the terms of the 1858 Treaty; to the extent that trade is conducted by residents of the Costa Rican side of the San Juan, all indications are that it is with the interior of Costa Rica, not with Nicaragua or other countries. However, the fact that there is little use of the San Juan by Costa Rica to transport merchandise obviously constitutes no ground for the invention by Costa Rica of new rights.

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[332] *East Timor* (Portugal v. Australia), 1995 I.C.J. 90, at p. 161 (June 30) (dissenting opinion of Judge Weeramantry). See also, e.g., the separate opinion of Judge De Castro in the *ICAO Council* case, "A rule of law may not be interpreted in a way which leads to an absurd result." *Appeal relating to the Jurisdiction of the ICAO Council* (India v. Pakistan), 1972 I.C.J. 46, at p. 136, (August 18) (separate opinion of Judge De Castro).

[333] CRM, para. 4.85.

[334] This incident is discussed in Chap. 3, Sec 1, paras. 3.1.33-3.1.45..

4.2.18 It therefore appears that Costa Rica, realizing that she has a right – to navigate with articles of trade – for which there is little use, now seeks to replace that right with a new right to transport tourists. The problem for Costa Rica is that no such right has ever, even remotely, been granted to Costa Rica by Nicaragua.

4.2.19 Returning to Costa Rica's contention that she navigated on the lower San Juan with armed vessels following the Cleveland Award "and Nicaragua respected this right [*sic*]",[335] the case cited by Costa Rica to support this allegation hardly shows any such attitude on the part of Nicaragua. In fact, it shows the contrary. As Costa Rica describes this incident, which occurred in 1892[336], the Costa Rican steamer *Adela* "began its voyage… at the mouth of San Carlos River in the direction of Castillo Viejo."[337] Thus the steamer entered Nicaraguan territory from the San Carlos River, which joins the San Juan from its southern side, at a point where the right bank constitutes the border. The author of the report cited by Costa Rica, Ciro A. Navarro, of the Costa Rican Treasury, states that before going ashore at Castillo Viejo to request permission to navigate in "the waters under the exclusive dominium of Nicaragua, I did hide in Costa Rican territory the arms and ammunitions that I carried for [a fiscal] post"[338] in Costa Rica, a post located a considerable distance to the west of the point at which the right bank of the San Juan becomes the border.

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[335] CRM, para. 4.85.
[336] CRM, Vol. 6, Annex 209.
[337] CRM, para. 4.85.

4.2.20 Costa Rica concludes that this incident shows that "navigation on the part of the San Juan that constitutes the border between Costa Rica and Nicaragua" (*sic* – the river does not, of course, constitute the border, which lies on the right, or Costa Rican, bank in this sector) by a "steamer carrying fiscal guards with their arms and ammunition was usual and did not provoke objection or response from the Nicaraguan authorities."[339]

4.2.21 As has been seen, the incident shows no such thing; in fact, it shows the opposite. The Costa Rican official felt the need to "hide in Costa Rican territory the arms and ammunitions" the vessel carried, prior to seeking permission from the Nicaraguan officials. Nicaragua can hardly be said to have failed to object to navigation by a steamer carrying arms and ammunition when the arms and ammunition were not being carried at all when permission was requested, but were instead "hid[den] in Costa Rican territory". This tends to show instead that the Costa Rican officers did not want the Nicaraguan authorities to know they were navigating with arms on the stretch of the San Juan where the right bank constitutes the border (between the confluence of the San Carlos River with the San Juan and the point three miles downstream of Castillo Viejo where the border departs from the right bank), suggesting strongly that they believed they had no right to do so.

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[338] CRM, Vol. 6, Annex 209.
[339] CRM, para. 4.87.

4.2.22 Moreover, there is nothing in the account to suggest that Nicaragua had previously tolerated the carriage of arms on the portion of the San Juan in which Costa Rica enjoys limited rights of navigation – or indeed that she tolerated such navigation by the vessel in question once its presence became known. Indeed, according to the report cited by Costa Rica, the Nicaraguan commander of the post at Castillo Viejo responded to the request for permission to pass by stating that "he had to follow previous orders which forced him to deny permission to let weaponry pass by the river;…"[340] In addition, following the denial of permission, the report states that "the steamboat carrying the guards was searched, as well as the river's coastlines; and the Castillo was reinforced with at least 25 soldiers."[341] This indicates that, far from being a routine occurrence which Nicaragua "respected", navigation even by steamboats carrying guards, let alone arms, gave rise to considerable alarm on the part of Nicaragua.

4.2.23 Before leaving this incident it is worth noting that just as Costa Rica may not claim new navigational rights because she chooses not to exercise significantly her right to navigate with articles of trade, so also the difficulty of transporting by land items for the re-supply of Costa Rican border posts does not result in the creation of new Costa Rican navigational rights on the San Juan. Thus the fact that "the Costa Rican Commander was obliged to transport its arms and ammunition by land, which was extremely difficult to do",[342] may be unfortunate, but it does not give Costa Rica a license to navigate with arms and ammunition in Nicaraguan territory. Instead, it suggests that land routes to border posts are still needed in Costa Rican territory.

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[340] CRM, Vol. 6, Annex 209, p. 847.

[341] CRM, Vol. 6, Annex 209.

[342] CRM, para. 4.86.

4.2.24 In an effort to show that she is abiding by the Cleveland Award, Costa Rica states that she cannot navigate with vessels of war because she "does not possess an Army…"[343] She continues: "Costa Rica does not have any vessels of war, but only police vessels with minimum defensive capacity."[344] The essence of this argument seems to be that whether or not a particular vessel is a warship depends upon what the state of its registry calls it. Surely this cannot be the correct test. Yet it demonstrates why President Cleveland was at pains to require a close connection between navigation by Costa Rican revenue vessels and navigation with articles of trade: the former cannot occur without the latter. This restriction serves to keep Costa Rica's public vessels within proper bounds, preventing them from growing into warships and from being used for purposes unrelated to navigation with articles of trade.

4.2.25 It is precisely this latter function that Costa Rica obviously chafes under and from which she is attempting to escape. In her *Memorial*, Costa Rica states: "The purpose of … vessels of the revenue service was and still is broadly the same: to prevent contraband, smuggling and trafficking of persons and other related activities proper to border areas."[345] This may

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[343] In the past decade, the amount spent on the acquisition of materiel by Costa Rican armed forces has amply surpassed that of all the combined armed forces of Nicaragua. Costa Rica may not have forces denominated an "army", but she does possess armed forces with attributes of both police and army forces. In particular, Article 24 of her General Law of Police, "Attributions", provides that the attributions of the Border Police include: "a) To patrol and protect maritime, land and air borders, including public buildings where customs and immigration activities are carried out." The "police" are also charged with the safeguarding of "b) . . . the integrity of the national territory, territorial waters, the continental shelf, the patrimonial sea or exclusive economic zone, the air space and the exercise of the rights that correspond to the State." NCM. Annex 85. Moreover, according to the Costa Rican newspaper La Nación (6 June 2006) "Gobierno desechara armas de Guerra" (Government will change its military armament), the Costa Rican police force "currently uses" M-16 rifles, war armaments given to the police force several years ago.

[344] CRM, para. 4.90.

[345] CRM, para. 4.93.

be true, and Costa Rica obviously has the right to use her revenue vessels for these purposes in her own waters. But President Cleveland did not authorize Costa Rica to conduct any of these activities on the San Juan except insofar as navigation by her revenue vessels was "related to and connected with her enjoyment of"[346] navigation with articles of trade. If Costa Rica believes there are cases of "trafficking of persons" on the San Juan that are properly of Costa Rican concern, for example, she may always request the assistance of Nicaraguan authorities or even seek special permission to stop and verify how a specific boat is being used on the San Juan. Her vessels may not navigate on the San Juan for the purpose of preventing such trafficking; however, for the simple reason that it does not involve navigation with articles of trade.[347] The effect of Costa Rica's argument is that she has a right to armed navigation on the San Juan for the purpose of immigration control. But, to state the obvious, the San Juan is Nicaraguan territory. A right of one country to enter the territory of another with arms, and to capture there citizens of the latter, in their own national territory, is something no Government would accept – at least without explicit prior authorization.[348] And yet this is what Costa Rica argues in her *Memorial*.

4.2.26 In the lengthy section of her *Memorial* on "protection of commerce and revenue control", Costa Rica devotes only three paragraphs to that subject.[349] These paragraphs consist of unsupported assertions by Costa

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[346] CRM, Vol. 2, Annex 16. Cleveland Award, *dispositif*, paragraph *Second*.

[347] It might be added that trafficking in persons also does not fall within any accepted definition of "commerce" but is rather a criminal activity.

[348] Evidence of Nicaragua's concern regarding Costa Rica's migration control activities in the vicinity of the San Juan is provided by the Note of Norman Caldera Cardenal, Foreign Minister of Nicaragua, to Minister Bruno Stagno of 2 June 2006; NCM, Annex 50.

[349] CRM, paras. 4.93-4.95.

Rican officials,[350] a description of the Costa Rican agencies that allegedly "protect its commercial navigation on the San Juan"[351] (although, as noted above, there is no record of any navigation on the lower San Juan by Costa Rican vessels of the revenue service after the 1886 incident), and affidavits of "several witnesses"[352] stating that Costa Rican police "regularly navigated the San Juan with personnel openly carrying their service weapons," and "even carried out joint tasks with the Nicaraguan armed forces."[353] There is no suggestion that Nicaragua acquiesced in the former activity, of which she may well have been unaware given the conditions on the San Juan. As to carrying out joint tasks with Nicaraguan armed forces, it is of course always open to Nicaragua in the exercise of her sovereignty to consent to specific instances of cooperative activity with Costa Rican forces in her territory, on the San Juan River.

4.2.27 In sum, therefore, Costa Rica offers no significant support for her assertion in this section of her *Memorial* (Chapter 4, Section D) that she has a right of "protection of commerce and revenue control". It is clear that under the Cleveland Award Costa Rica "may navigate [the San Juan] with such vessels of the revenue service …as may be necessary to the protection of [the] enjoyment [of navigation with articles of trade]."[354] Surprisingly, Costa Rica does not address this right at all in this section of her *Memorial*, even though it is entitled "protection of commerce and revenue control". The reason for this omission is presumably that, as noted above, there is virtually no navigation by Costa Rica on the San Juan with articles of trade and therefore no need to protect such navigation. Yet this is where Costa Rica's right of protection with revenue vessels begins and ends. Without navigation with articles of trade, there is no right of protection.

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[350] This is the case of the statement of the Costa Rican Foreign Minister, set forth at length in the CRM para. 4.93.
[351] *Ibid.* para. 4.94.
[352] *Ibid.* para. 4.95, where the thrust of these affidavits are very briefly described as quoted in the text accompanying the following footnote of the *Memorial.*
[353] *Ibid.*
[354] CRM, Vol. 2, Annex 16. Cleveland Award, *Second* of *dispositif.*

D. COSTA RICA'S ALLEGED RIGHTS AND OBLIGATIONS TO SAFEGUARD (GUARDA) THE RIVER AND TO CONTRIBUTE TO ITS DEFENCE, AS WELL AS THE DEFENCE OF THE COMMON BAYS

4.2.28 Here again, Costa Rica takes a very limited obligation under Article IV of the 1858 Treaty to defend the Bays of San Juan del Norte and Salinas as well as her bank of the San Juan River and seeks to expand it into a sweeping right to safeguard and defend the entire lower San Juan River.

4.2.29 Such a sweeping right would support Costa Rica's apparent goal of navigating with armed public vessels on the San Juan, especially in view of the fact that, as demonstrated above, she has no case for doing so with vessels of the revenue service for the protection of commerce or revenue control. Costa Rica rests this obligation, from which she infers broad rights, on the 1858 Treaty and other agreements and practice.

4.2.30 It has been shown previously in the present chapter that there is in fact no such support for the rights claimed by Costa Rica. While Costa Rica states in the concluding paragraph of the relevant section of her *Memorial*[355] that her right to navigate on the San Juan for the purpose of carrying out the "tasks of custody and safeguarding of the San Juan" was "recognized in the Cleveland Award", *inter alia*, she makes no argument to this effect and does not otherwise support the proposition.

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[355] CRM, para. 4.106.

4.2.31 Such an unsupported assertion of broad rights of armed navigation is in effect self-refuting. These are certainly rights that Nicaragua cannot accept, *inter alia*, because they are nowhere supported in the Cleveland Award. In fact, the following words of George L. Rives, to whom President Cleveland delegated the task of preparing a draft of the award, negate such a right. In addressing whether Costa Rica has a right to "maintain a river police" to "patrol the river in boats", Rives also explained the meaning of Article IV of the 1858 Treaty:

> "This may be a convenient way of preventing smuggling; but it is not so necessary an incident to the rights of Costa Rica to enforce her customs laws as to be inevitably implied *ex-necessitate* from the provisions of the treaty.
>
> The stipulations of Article IV throw no light on this question. All that article requires is that Costa Rica should repel foreign aggression on the river with all the efficiency within her reach. If under the terms of the Treaty, Costa Rica is not permitted to maintain vessels of war on the River she cannot be regarded as derelict if she fails to oppose foreign aggression in that quarter by her naval forces. Impossibilities are not required. Costa Rica would only be bound to contribute to the defence of the stream by land, a mode of defence, it may be added, which seems better adapted to a River of the size and character of the San Juan."[356] (Emphasis in original)

4.2.32 Thus, as explained by Rives, to the extent that "safeguarding" (*guarda*) against "foreign aggression" is needed, the 1858 Treaty provides for Costa Rica to accomplish it from her "shores of the San Juan River" ("*las márgenes del rio de San Juan*").

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[356] NCM, Annex 71. Report of George L. Rives (Second), (p. 211-212 of original handwritten version.)

4.2.33 In any event, the terms of Article IV of the Treaty, given their ordinary meaning, frame this function as an *obligation*, not as a right. George L. Rives clearly views Article IV in this manner, as the passage quoted above demonstrates. This obligation would not arise unless and until there was an external threat or attack – an "attack from without" ("*aggression exterior*").

4.2.34 When viewed in the context of the entirety of Article IV, it becomes clear beyond doubt that the term in question ("*guarda*") refers to the obligation of Costa Rica to defend against external aggression, in the event such should actually occur or be threatened, not to patrol the river or even the banks on a routine basis in time of peace. The first sentence of Article IV concerns the "defense" of the bays of San Juan del Norte and Salinas; the second sentence of the article provides that Costa Rica is obligated ("*está obligado Costa Rica*"), as respects the portion of the banks of the San Juan corresponding to her, to unite with Nicaragua in "safeguarding" ("*guarda*") the river.

4.2.35 Thus, in sum, Costa Rica's obligation to "safeguard" (a) would only arise in the event of external aggression, (b) would have to be carried out together with Nicaragua, and (c) would have to be performed from her bank of the river, not from boats on the water. Both the 1858 Treaty and George L. Rives Rives frame this as an obligation, not as a right. There is no right to "safeguard" from boats on the river, and Costa Rica's obligation to "safeguard" from her banks must be exercised jointly with Nicaragua.

E. COSTA RICA'S ALLEGED RIGHT TO THE RE-SUPPLY OF AND TRANSPORT OF PERSONNEL TO AND FROM BORDER POSTS AND "OTHER RELATED RIGHTS"

4.2.36 As for other rights alleged by Costa Rica, these find absolutely no support in the Cleveland Award, as shown in Chapter 5.

Section 4.3

Costa Rica purports a right of navigation in the San Juan de Nicaragua River that is not granted by the Jerez – Cañas Treaty or by the Cleveland Award

4.3.1 It is significant that for more than one hundred years the observance of the Jerez-Cañas Treaty has not posed any problem in relation to the exercise of the limited right of navigation recognized to Costa Rica "with articles of trade". In fact, soon after the conclusion of the Treaty the occlusion of the mouth of the river rendered the San Juan River useless for the importation and exportation of Costa Rica's products. By 1862-1863, the port of San Juan del Norte was blocked[357]. The revenue service steamer that Costa Rica wanted to introduce in the river in 1886 no longer had anything to do with safeguarding the only right recognized by the Treaty.

4.3.2 The denial of Costa Rica's desires by the Cleveland Award, which granted her the right of navigation with revenue service vessels strictly linked to navigation with articles of trade that in practice it could only attempt to translate into a modest coasting trade, coupled with the abandonment of the inter-oceanic canal projects, once it was decided to build the canal in Panama, caused the sister Republic, today petitioner, to lose any strategic and commercial interest in the San Juan River it may have had in the past.

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[357] Reply of the Republic of Nicaragua to the Case of the Republic of Costa Rica submitted to his Excellency Hon. Grover Cleveland, President of the United States. 1887. Washington 1887. p. 38.

4.3.3 Indeed, diplomatic correspondence is notorious by its absence, and can be described as episodic and specific, dealing with other difficulties and conflicts between the parties that may have had for scenario the river, as well as other points along their extensive border. Costa Rica is unable to document a single incident in one hundred years that had anything to do with a breach of her right to navigate the San Juan River with articles of trade. Nor is there any record that after the Cleveland Award any Costa Rican revenue service vessel navigated the San Juan River under the terms established by the Award.

4.3.4 It was only until the nineteen eighties[358] that Costa Rica invoked, at first cautiously, and then more brazenly in the nineties[359], the Jerez-Cañas Treaty to affirm rights of navigation and other rights over the river that have nothing to do with the limited right of navigation "with articles of trade" recognized in Article VI of the Treaty, nor with the rights of its revenue service vessels ***related to the exercise of this right*** as interpreted by the Cleveland Award. These are the two instruments upon which the special regime of San Juan River is exclusively based, as has been repeatedly recognized by the parties.[360] "Nothing has occurred since 1888 that modifies that juridical situation", said Costa Rican President Miguel Ángel Rodríguez.[361]

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[358] On 8 June 1982, Costa Rican Minister of Foreign Affairs Fernando Volio addressed, for the first time, Nicaragua's *chargé d'Affaires a.i.* to transmit the complaint lodged by *Swiss Travel Service S.A.* after a boat belonging to that Costa Rican company was intercepted by a Nicaraguan patrol in the San Juan River. According to the Note, the incident affected "The right of free navigation on the San Juan River that are categorical and in perpetually guaranteed for Costa Rica, and *because it economic interests of the country*" (emphasis added). CRM, Vol. 3, Annex 41. Nicaragua rejected the protest in a Note of 2 August of that year. CRM, Vol. 3, Annex 44.

[359] On 15 March 1994, Costa Rican Minister of Foreign Affairs Bernd Niehaus addressed his Nicaraguan counterpart Ernesto Leal in reference to the fact that Nicaraguan agents had demanded payment of a toll tax from Costa Rican vessels navigating in the San Juan River that were carrying tourists (NCM, Annex 41). On 21 March 1994, Minister Leal replied that "the expression in the Treaty '*con objetos de comercio*' [with articles of trade] excludes any other activity", adding that "the terms of the treaty should be interpreted in the standard sense they had at that time" and that "being it a Treaty of Limits, it should be interpreted in a restrictive way." The Nicaraguan Minister went on to conclude: "...Costa Rica's perpetual right of free navigation, ... does not include tourism, and much less the free access to Nicaragua's sovereign territory to foreign citizens who travel in Costa Rican vessels that navigate on the said River." CRM, Vol. 3, Annex 48. This would become a formulation constantly repeated in Nicaragua's Notes and diplomatic statements every time Costa Rica sought a different interpretation.

4.3.5 Costa Rica again and again pays *lip service* to Nicaragua's sovereignty and "dominion and sovereign jurisdiction", while attempting to undermine and empty it of any content by claiming for itself a status, which has no basis in the Treaty, that in fact would allow the exercise of competencies proper of a sovereign in the course of a river that does not belong to Costa Rica.

4.3.6 Costa Rica intends to transfigure this limited right of navigation "with articles of trade", recognized in Article VI of the Jerez-Cañas Treaty, into a right to use a section of the San Juan River to engage in tourism, sports or any other activities she may choose to undertake, as well as to link the watercourse to the defense and protection of its interests in the area of customs, migration or struggle against illegal trafficking.

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[360] See NCM, Annex 62 Constitution of Costa Rica of 1917 (Article 5) and NCM, Annex 63, Constitution of Costa Rica of 1949 (Article 5). See also the Note of 12 August 1998, (CRM, Annexes Vol. 3, Annex 50) and the Note of Costa Rican Minister of Foreign Relations Roberto Rojas of 22 May 2000: "we are before a Special Regime established by a Treaty and an Award that are inherent and specific to public international law…". (CRM, Vol. 3, Annex 63) See also NCM, 79. Yearbook of the Ministry of Foreign Affairs, 2001-2002, at 143. NCM, Annex 47. Note of 6 December 2004.

[361] Note of 29 July 2000. CRM, Vol. 3, Annex 66.

4.3.7 In all the aforesaid points, it is possible to establish mechanisms of border cooperation through an agreement between the neighboring Republics. Nicaragua has always been and continues to be willing to negotiate and implement these types of agreements as has already been done in the past.

4.3.8 However, Nicaragua is not willing nor could be willing to accept a crude revision of the Jerez-Cañas Treaty, through a self-serving interpretation that renders it unrecognizable and destroys the foundation on which the delicate balance of Nicaragua and Costa Rica's territorial interests were erected in 1858. When Costa Rica frivolously claims the violation of her rights by Nicaragua, it is only providing evidence of Nicaragua's persistent and unequivocal denial that such rights exist.

4.3.9 Costa Rica attempts to extend the right of navigation "with articles of trade" (with commercial objects) to the transportation of "tourists". This activity is not contemplated in the 1858 Treaty. The reason it was not included is not that this was an unknown occupation at the time of the Treaty. Quite the contrary. The transport of passengers, especially foreign passengers which would be the nearest equivalent of the tourist trade, was a booming business. Nicaragua had signed contracts for example with Commondore Vanderbilt that had been extremely lucrative.[362] Costa Rica herself, taking advantage of the Filibusterer War in Nicaragua had signed in December 1856 a similar contract with Mr. Webster (the Mora-Webster contracts). The transport of passengers was thus a very important business and it was in dispute between both States. In fact, this business of the transport of passengers (tourists in fact) was one of the most heatedly disputed questions between the Parties. Then, why was no mention of this line of business made in the 1858 Treaty that very carefully only referred to "commercial objects" (objetos de comercio) whilst the 1857 Juarez-Cañas Treaty only referred to "commercial articles" (articulos de comercio)? The answer clearly is that the transportation of merchandise (objects, articles of trade) was included but not the transport of passengers.

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[362] NCM, Chap. 1, para. 1.3.15.

4.3.10 Costa Rica asserts that trade and the notion and contents of "trade" have changed. Now it not only includes commodities, but also services, among others, tourism. Should this affect the interpretation of the Jerez-Cañas Treaty? Costa Rica believes so[363]. Nicaragua firmly asserts the contrary.

4.3.11 Should the terms used in the treaty be interpreted according to their meaning at the time it was concluded (principle of *contemporaneousness*), or is it appropriate to assume meanings that emerge later? The Vienna Convention does not make any provision on this matter. It is necessary to take into account the intention of the parties when adopting the text or infer it from *subsequent agreements between the parties* and *any subsequent practice in the application of the treaty*. In such circumstances, recourse to the treaty's *object and purpose* is decisive.

4.3.12 The award in the case of *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* (1951) is illustrative, even though it refers to a contract between a State and a foreign investor. The arbitrator deemed that the hydrocarbon concession granted in 1939 by the sheikh of Abu Dhabi to *Petroleum Development Ltd* over his territory should not extend to the continental shelf, a notion unknown at that date, based on the assumption that the person who grants property rights of great value does not have the intention to grant more rights than those in his possession at the time of the transfer[364].

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[363] CRM, paras. 4.58-4.72.

4.3.13 On the contrary, in the case concerning the *Aegean Sea Continental Shelf* (1978), the Court, forced to interpret the reservation formulated by Greece in 1931 to the 1928 General Act for Pacific Settlement of International Disputes, which excluded the Court's competence in any disputes relating to territorial status, ruled that the reservation also affected disputes concerning the continental shelf because it was presumed, given the circumstances and the purpose of the same, that the meaning of territorial status was to follow the evolution of the law and assumed, at all times, the meaning given by the rules in force[365].

4.3.14 However, both judgments respond to the same objective of restrictively interpreting any assignment of sovereignty. The references to territory exclude the continental shelf, a recent concept, since it cannot be presumed that the intention of the sovereign is to extend a concession over new spaces subject to its jurisdiction, but include it when it is a matter of limiting the set of controversies, the solution of which the sovereign is placing in the hands of a third party.

4.3.15 "In appreciating the intention of a Party to an instrument", says the Court (Judgment of 19 December 1978), "there is an essential difference between a grant of rights of exploration and exploitation over a specified area in a (mineral oil) concession and the wording of a reservation to a treaty by which a State excludes from compulsory procedures of pacific settlement disputes relating to its territorial status. While there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appear to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind. Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time"[366].

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[364] Arbitral Award of 28 August 1951. *International Legal Materials*. 1951, p. 144.
[365] *ICJ Reports*, 1978, p. 32, Judgment of 19 December 1978, para. 77.

4.3.16 In general, treaties imposing limitations on the territorial sovereignty of a State must be interpreted in restrictive terms. This is obvious in case of doubt. Already on the first judgment of the Permanent Court of International Justice, when ruling on the right of the S.S. Wimbledon to free passage through the Kiel Canal under the terms of Article 380 of the Treaty of Versailles the Court held that: "Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. *This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such*

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[366] *Ibid.*

limitation"[367]. Naturally, the restrictive interpretation does not proceed when the text is clear: "the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted"[368].

4.3.17 In any case, an *evolutionary* interpretation should not be confused with the incorporation of mechanisms in a treaty that allow for the *evolution* of its provisions and facilitate their adaptation to new international law rules.

4.3.18 The latter is what the Court actually emphasized in its judgment concerning the case of the *Gabcikovo-Nagymaros Project* (1997)[369]. However, as Judge Bedjaoui stated in his separate opinion, *interpretation* of a treaty has not be confused with its *revision* and when applying the so-called principle of *evolutionary interpretation* of a treaty the Court should have in mind that the general rule governing the interpretation of a treaty remains that set out in Article 31 of the 1969 Vienna Convention[370].

4.3.19 If we apply this reasoning to the case at hand, we will easily reach the conclusion that the reference to *commerce* in Article VI of the Jerez-Cañas Treaty comprised in 1858, and still comprises today, traffic in commodities and not services unrelated to said traffic. This is particularly the case when the words "with articles of" are added to "commerce".

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[367] Emphasis added. PCIJ, *Case of the S.S. Wimbledon*, Judgment of 17 August 1923, *Recueil des arrêts*, A/01, pp. 24.
[368] *Ib.*, pp. 24-25. See too PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex*, Judgment of 7 June 1932, Series A/B, Judgments, Orders and Advisory Opinions, fasc. 46, p. 167.
[369] *ICJ Reports*, 1997, Judgment of 25 September 1997, pp. 67 ff., para. 112 ff.
[370] *Ibid.*, pp. 121-124, para. 6-18.

4.3.20 It is not just a matter of arguing the nature, object and purpose of a treaty of territorial limits, in which the territorial sovereignty limitations should be restrictively interpreted; it is rather a matter of further respecting the grammatical, logical and systematic meaning of a text that does not refer to "trade", but rather to "articles of trade".

4.3.21 Not only that. Costa Rica deliberately forgets that the right in question is a right of "navigation". To *navigate* is to travel by water from one point to another. Neither more nor less. Any added value exceeds the concept of navigation and as this value increases, navigation ends up being a mere support of a different activity, whether it be tourism, radio broadcasting, fishing or gambling. This has nothing to do with the mere transport or carrying of things or persons (these last, in any case, are by the express limitation to navigation with "articles of trade"). The purpose of Costa Rica is not to navigate, but to commercially exploit, for tourism purposes, a river that does not belong to her.

4.3.22 As Judge Kooijmans stated in his separate opinion that accompanied the judgment of the Court of 13 December 1999, in the case of the *Kasikili/Sedudu Island* (Botswana/Namibia), the navigation for tourist purposes "has virtually nothing to do with fluvial transport in the normal sense of the word 'navigation', as this is understood to mean transport by boat in a river from one place to another"[371].

4.3.23 Nicaragua could not assert an interpretative mummification that would lead her to demand that the right of navigation be exercised according to the nautical means of 1858. It is possible to assume the gradual

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[371] Judgment of 13 December 1999, Separate Opinion of Judge Kooijmans, para. 29.

modernization of the means of transport to the extent allowed by Nicaragua's obligations with third parties and the measures that she must adopt for security reasons and environmental conservation in the exercise of her sovereign responsibility over the river.

4.3.24 It should also be acknowledged that the articles of trade, merchandise and goods being transported are subject to change over time. It would be unreasonable to seek a limitation to only the products concerned in 1858. But if the "articles" can change, they nonetheless have to continue being "articles".

4.3.25 The fact that the use of this limited right of navigation with articles of trade is modest today, even irrelevant, does not allow its beneficiary the right to use the river for developing other profitable activities as a form of compensation.

4.3.26 The right of navigation with articles of trade must not be confused with the commercial exploitation of a fluvial course through tourism or other activities. This is Costa Rica's claim, but it is not a right based on article VI of the Jerez-Cañas Treaty. The claim and any behaviour based on it is abusive.

4.3.27 This is so because it appears to reflect a deliberate policy in which first authorizations and permits are applied for, trusting that in a policy of good neighbourliness, Nicaragua will proceed to grant them as boundary courtesies, thereafter claiming said authorizations and permits as a right and invoking the Jerez-Cañas Treaty. This has occurred with her claimed right to navigate (armed, it must be added) to re-supply her border posts (see Chapter 5.2) or for sporting or tourist activities.

4.3.28 This was the case, for example, with the *International Nautical Rally Sarapiquí River/San Juan River*. In 1993 ADENA of Costa Rica applied for the pertinent permit from the Nicaraguan authorities[372], which granted it[373]. The same occurred again each year from 1994 to 1999. However, in the year 2000, ADENA decided to hold the VII Rally without applying for a permit. Logically, when the participating boats entered the waters of the San Juan River, they were detained. On 26 October, five days after the events, the Minister of Foreign Affairs of Costa Rica formulated a formal protest, describing them as a serious violation of Costa Rica's right of free navigation, in accordance with the Jerez-Cañas Treaty[374]. In 2005, ADENA of Costa Rica once again applied for a permit (with a copy to its country's Ministry of Foreign Affairs)[375].

4.3.29 As regards tourism, it is worth mentioning in particular the Memorandum of Understanding signed on 5 June 1994, by the Ministers of Tourism of Nicaragua and Costa Rica regarding tourist activities in the border zone of the San Juan River[376]. It literally affirms that Costa Rican tourism companies have an *obligation* to acquire tourist cards and to register in Nicaragua. Whether this Memorandum of Understanding is or is not a legally binding agreement, there can be no more explicit admission by the Minister in charge of tourism on behalf of the Costa Rican Government that Nicaragua has a sovereign right to establish controls and demand payment of certain fees for carrying out an activity not covered in the Jerez-Cañas Treaty.[377]

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[372] NCM, Annex 39. Note from the Director of ADENA, Julio Martín to the Ambassador of Nicaragua in Costa Rica Mr. Alfonso Robelo. San José, 27 September 1993.

[373] NCM Annex 40. Note from Ernesto Leal, Minister of Foreign Affairs to the Ambassador of Nicaragua in Costa Rica, Alfonso Robelo, 8 October 1993.

[374] NCM Annex 44. Note from the Minister of Foreign Affairs and Worship of Costa Rica Mr. Roberto Rojas to the Minister of Foreign Affairs of Nicaragua Mr. Francisco Xavier Aguirre. San Jose, 26 October 2000.

[375] NCM Annex 48. Note from Miguel A. León, Director of ADENA to the Ambassador of Nicaragua, Francisco Fiallos Navarro San José, 27 May 2005.

[376] CRM, Vol. 2, Annexes 25 and 26.

4.3.30 Costa Rica's claim that her revenue service vessels may navigate the San Juan River to exercise competencies related to customs, migration or the struggle against illegal trafficking[378] lacks all basis in the Jerez-Cañas Treaty and Cleveland Award, and is manifestly incompatible with the "exclusive dominion and sovereignty" in a place where, as Costa Rican Foreign Minister Tovar stated, "a drop from the San Juan River is a Nicaraguan drop."[379]

CONCLUSION

4.3.31 The recognition that Nicaragua enjoys "exclusive dominion and supreme control" over the San Juan River emphasizes the very circumscribed rights accorded to Costa Rica under the 1858 Treaty. Costa Rica does not enjoy a right of "free navigation" as such, but a right of free navigation "con objetos de comercio" (with articles of trade/objects of commerce) in the context of the Nicaraguan sovereignty over the course of the river.

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[377] CRM Vol. 2, Annex 29. These fees for obtaining a tourist card were suspended in September 2002 (Alajuela Declaration) in reciprocity for the suspension by Costa Rica of a visa fee that was being charged to Nicaraguan citizens.

[378] See, for instance, Costa Rica's Note 12 August 1998, which directly ignores the conditions imposed by the Cleveland Award on navigation by revenue service vessels. (CRM, Vol. 3, Annex 50.) See also the Yearbook of the Ministry of Foreign Affairs, 1998-1999, at 33; the speech by Costa Rican Foreign Minister Roberto Rojas (OAS, 8 March 2000): "A vessel belonging to the revenue service, intended by its very nature to undertake tasks such as the prevention of smuggling, illegal immigration and other aspects related to border control necessarily requires that government agents aboard carry protective equipment. Otherwise, how can they be expected to fulfill these tasks?" CRM, Vol. 6, Annex 228.

[379] See article in La Prensa, dated 18 February 2005, titled "Tovar reconoce soberanía nica" (Tovar recognizes Nicaraguan Sovereignty). NCM, Annex 82.

4.3.32 The transport of passengers is excluded from the right of free navigation with articles of trade conceded to Costa Rica by Article VI of the 1858 Treaty.

4.3.33 The right to land at any part of the banks of the San Juan River is associated to the right to navigate with articles of trade.

4.3.34 This Chapter has also shown that under the 1858 Treaty as interpreted in the Cleveland Award, Costa Rica's rights of navigation on the San Juan River hinge on her navigation with articles of trade. Without navigation of the latter kind, Costa Rica enjoys no right of navigation with vessels of the revenue service. The only navigation that is permissible by such vessels under the Award is navigation that is "related to and connected with" Costa Rica's enjoyment of navigation with articles of trade, or navigation that "may be necessary to the protection of said enjoyment." Since Costa Rica does not engage in significant navigation with articles of trade, she has no right to navigate with vessels of the revenue service or, *a fortiori*, any other kind of public vessel. From all that appears, Costa Rica has not attempted to navigate on the San Juan with revenue vessels since 1886. There being no need for the only kind of navigation that is permitted by the 1858 Treaty and the Cleveland Award, Costa Rica attempts to create new rights of navigation for entirely different kinds of public vessels, serving completely different purposes, and seeks to re-interpret the phrase "*con objetos de comercio*" to permit carriage of passengers. None of these rights is recognized in the 1858 Treaty or the Cleveland Award. Thus if

Costa Rica is to navigate on the San Juan in ways that are not authorized by these two sources of the law governing her navigational rights on that Nicaraguan waterway, it must be with the express permission of Nicaragua.

CHAPTER 5

NICARAGUA HAS NOT BREACHED ANY OTHER RIGHTS ALLEGED BY COSTA RICA

5.1.1 The present proceedings concern alleged "breaches by Nicaragua of Costa Rica's rights of navigation and related rights in respect of the San Juan River"[380]. It is apparent that Costa Rica has a very extensive conception of these "related rights". According to the Costa Rican Submissions, they would include rights ensuing from an alleged obligation of Nicaragua "to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes"[381] (Section 1). In other parts of the *Memorial*, Costa Rica stresses its "responsibilities to guard and protect the River under Article IV of the Treaty of Limits and Article 2 of the 1956 Agreement and otherwise"[382], which would include in particular the right to re-supply border posts (Section 2) and various other rights (Section 3).

Section 5.1

Alleged Breaches of an Alleged Customary Right to Fish

5.1.2 Under paragraphs 4.124 to 4.128 of her *Memorial*, Costa Rica asserts an alleged "customary right to fish in favour of residents of the Costa Rican bank" [383] of the San Juan River, which, it claims, would have been breached by Nicaragua[384] and requests a formal declaration of the Court on the alleged violation of this right[385].

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[380] CRM, p. 1, para. 1.01.

[381] CRM, p. 147, para. 2(i).

[382] CRM, p. 3, para. 1.08. On the alleged rights to safeguard and defence the river, see above, para. 2.1.52-2.1.70.

[383] CRM, p. 89, paras. 4.124-4.128.

[384] CRM, pp. 134, paras. 5.141-5.143; see also, p. 36, para. 3.28.

[385] CRM, p. 147, para. 2(i); see also p. 139, para. 6.03(i).

5.1.3 The legal basis for the "customary right" to fish thus claimed by Costa Rica is unclear. One thing is apparent: the Claimant does not allege that this alleged right (and the correlative obligation bearing upon Nicaragua) follows from the 1858 Treaty of Limits as interpreted by the Cleveland Award. In this respect, Costa Rica makes the following assertions:

- first, such a customary right would "not be uncommon for the inhabitants of border regions *in Africa*"[386];
- second, it would have been "recognized in cases in which the boundary delimitation entirely left a river to one of the neighbours"[387];
- third, "this *practice*" would correspond "with the first regime of the San Juan ever applied" [388] as established by the Royal Charter of 29 November 1540; and
- fourth, it would have "been respected by Nicaragua until very recently"[389].

5.1.4 This invocation of a "customary right to fish" contradicts Costa Rica's own approach in the present case, according to which the other rights associated with the navigational rights can only "arise from the same treaty [i.e. the Treaty of Limits] or from other international binding instruments"[390]. Furthermore, in the diplomatic exchanges having taken place between Nicaragua and Costa Rica, the latter constantly asked for the recognition of "neither more nor less rights than those established by the Treaty [of Limits]"[391]. The "customary right" to fish clearly falls outside this scope and cannot be deduced in any way from the 1858 Treaty of Limits.

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[386] See ICJ, Judgment, 13 December 1999, *Kasikili/Sedudu Island*, *ICJ Reports*, 1999, p. 1094, para. 74 – Italics added; see CRM, p. 89, paras. 4.124-4.126.

[387] CRM, p. 90, para. 4.127.

[388] CRM, p. 90, para. 4.128; see also, p. 134, para. 5.141. And see CRM, Vol. 2, Annex 1 – italics added.

[389] *Ibid.*

[390] CRM, p. 87, para. 4.118.

5.1.5 This being said, Costa Rica does not establish even a mere "customary right" to fish in the river. As recalled by the Court, "[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. [The Costa Rican Government in this case] must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting [the alleged right] and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'"[392]. None of the above allegations, in itself or in combination with the others, is capable of establishing such a custom.

5.1.6 It is true that, as a matter of courtesy and convenience, Nicaragua has usually tolerated a limited use of the San Juan for non-commercial fishing by Costa Rican riparians, but this tolerance cannot be seen as a source of a legal right[393] nor can it imply the recognition of a "right to fish" for commercial purposes:

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[391] See Note of the Minister of Foreign Affairs of Costa Rica to the Minister of Foreign Affairs of Nicaragua, 19 August 1886, CRM, Vol. 3, Annex 33, at p. 224; Note of the Foreign Affairs Secretariat of Costa Rica to the Minister of Foreign Affairs of Nicaragua, 11 November 1886, NCM, Annex 30; Note from the Ministry of Foreign Affairs and Worship of Costa Rica to the Vice-Minister of Foreign Affairs of Nicaragua, 12 August 1998, CRM, Vol. 3, Annex 50, at p. 311; Note from the Costa Rican Minister of Foreign Affairs and Worship to the Nicaraguan Minister of Foreign Affairs, 28 September 2005, CRM, Vol. 3, Annex 80, at p. 437; Communiqué of the Ministry of Foreign Affairs and Worship, 28 September 2005, NCM, Annex 83; Text from the National Radio and Television Chain address by the President of the Republic, Dr. Abel Pacheco - 2 October 2005, NCM, Annex 84.

[392] ICJ, Judgment, 20 November 1950, *Asylum Case, ICJ Reports* 1950, p. 276.

- as indicated above[394], Costa Rica has constantly accepted that it has no rights except those stemming from the treaties and not from customary law;
- Nicaragua has accepted, as a matter of courtesy, subsistence or leisure fishery by Costa Rican riparians;
- but this tolerance was made in conformity with the spirit of cooperation and good neighbourhood which has characterized the relations between the two sister Republics.

5.1.7 As is well known, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even the habitual character of the acts is not in itself enough"[395]. In this respect, the present case is comparable to the *Lotus* case where the Permanent Court found that the practice invoked by France did not conclusively show that the States concerned "recognized themselves as being obliged to" abstain from acting in the way alleged by France; "for only if such abstentions were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom"[396].

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[393] And if it were – *quod non* –, it would result in a right not for Costa Rica but for her nationals; if it were so, Costa Rica would have to be seen as acting on their behalf on the ground of diplomatic protection. The conditions for exercising diplomatic protection are clearly not fulfilled in the present case. See General Conclusions.

[394] NCM, para. 5.1.4.

[395] ICJ, Judgment, 20 February 1969, *North Sea Continental Shelf Cases*, *ICJ Reports* 1969, p. 44, para. 77.

5.1.8 Similarly, in the present [illegible], besides the fact that Costa Rica has only produced a handful of affidavits in support of the practice she invokes[397], she has certainly not shown that the fishing activities in question were accepted as being the exercise of a *right* belonging to the Costa Rican riparians of the south bank of the San Juan.

5.1.9 *First*, it goes without saying that a possible customary right of this kind "for the inhabitants of border regions *in Africa*"[398], could have nothing to do with the present case. It could, in the last event, not be more than a "regional" custom applying solely to Africa. And even as far as Africa is concerned, such a right is a mere invention of Costa Rica:

- if it existed at all in a remote past, it was not in an inter-State context;
- the extract of the *Kasikili/Sedudu Island* case quoted by Costa Rica in support of her allegations[399] has strictly nothing in common with the present situation;[400]

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[396] PCIJ, Judgment, 7 September 1927, *Lotus*, Series A, N° 10, p. 28.

[397] See CRM, Vol. 4, Annexes 105 to 109.

[398] See ICJ, Judgment, 13 December 1999, *Kasikili/Sedudu Island*, *ICJ Reports*, 1999, p. 1094, para. 74.

[399] CRM, p. 89, para. 4.124.

[400] The whole passage reads as follows: "While it is true that the early maps of the region placed the boundary around Kasikili/Sedudu Island in the southern channel of the Chobe, none of them officially interpreted the 1890 Treaty (see paragraph 84 below), and the evidence would tend rather to suggest that the boundary line was shown as following the southern channel as a result of the intermittent presence on the Island of people from the Caprivi Strip. However, there is nothing that shows, in the opinion of the Court, that this presence was linked to territorial claims by the Caprivi authorities. It is, moreover, not uncommon for the inhabitants of border regions in Africa

- nor has the passage of the Decision of the *Eritrea-Ethiopia Commission* also quoted by Costa Rica[401]; moreover and more generally, in neither decision is there any mention of fishing rights;
- it can certainly happen that fishing rights are expressly mentioned in treaties, and especially so when the river in question is the common boundary between the States concerned, where there can be no doubt that the populations of both banks have a right to fish in the common river, as is the case of the 1934 Agreement between Tanganyika and Rwanda-Urundi also quoted by Costa Rica[402], but, this again has not much to do with the present case, except, maybe, *a contrario* since such a treaty right applies to rivers forming the boundary between two States and shared by them.

5.1.10 *Second*, the same holds true in respect to Article 8 of the Protocol on the Border between Guinea and Sierra Leone concluded between France and Great Britain on 1 July 1912 also quoted by Costa Rica. According to this provision:

> "In the part of the Moa included between cairns XV and XVI the river and the islands belong entirely to France. The inhabitants of the two banks have, *however*, equal rights of fishing in this part"[403]. (Italics added)

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to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border" (*ICJ Reports* 1999, p. 1094, para. 74).

[401] CRM, p. 89, para. 4.125. The whole paragraph from which this extract is part reads: "In these circumstances, the Commission holds that the determination of the boundary within rivers must be deferred until the demarcation stage. In the meantime, there will be no change in the *status quo*. The boundary in rivers should be determined by reference to the location of the main channel; and this should be identified during the dry season. *Regard should be paid to the customary rights of the local people to have access to the river.*" (the passage quoted by Costa Rica is in italics).

[402] CRM, pp. 89-90, para. 4.126.

[403] CRM, p. 90, para. 4.127; see 9 *Martens NRG* (3^{rd}) 805.

5.1.11 The word "however" is telling: it shows that while the normal consequence of leaving the river to France alone would have been that the British subjects would normally *not* have had the right to fish, they got it as a *treaty right*. By contrast, the 1858 Treaty of Limits between Costa Rica and Nicaragua does not provide for such a right.

5.1.12 *Third*, the import of the provisions of the Royal Charter of 1540[404] are a moot question since it was replaced in 1573 by a Royal Charter of Philip II[405] which substantially modified the territorial limits of both provinces and fixed the limits which remained in force during the remaining colonial period until independence in 1821. There is nothing in this later instrument that could be quoted in order to justify any common fishing or any common use of the River by both provinces – quite to the contrary, the Sovereign accorded to Diego de Artieda "license and authority to discover, settle and pacify the aforesaid province of Costa Rica" only, "*on the northern part, from the mouths of the Desaguadero, which are parts of Nicaragua*"[406] (emphasis added). This clearly left the River under the authority of the sole province of Nicaragua.

5.1.13 Whatever might have been the situation between 1540 and 1573, it was deeply modified, and fixed without any change up to the present time, by the Treaty of Limits of 1858. As shown in Chapter 2 above, said Treaty put an end to any Costa Rican claims and recognized the full sovereignty of Nicaragua over the river, with the sole exclusion of the limited rights of navigation conceded to Costa Rica. Those rights do not include any fishing rights in favour of Costa Rican nationals.

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[404] **CRM, Vol. 2, Annex 1.**

[405] **See *supra*, para. 1.2.10-1.2.12. ()**

[406] **NCM, Annex 86.**

5.1.14 A final word on the question of the right to fish by Costa Rican riparians of the San Juan. Costa Rica claims in her *Memorial* (paragraph 4.128) that: "The right of fishing of the residents of the Costa Rican bank of the San Juan for subsistence purposes has been respected by Nicaragua until very recently, when – after the institution of these proceedings – it began to prevent the riparians from engaging in it."

5.1.15 Nicaragua wishes to make quite clear that notwithstanding its rights over the San Juan River, it has never ordered the prevention of fishing for subsistence purposes by Costa Rican riparians. Thus, the first part of the statement by Costa Rica is perfectly true and simply shows the policy of good neighborliness traditionally adopted by Nicaragua. What Nicaragua does not accept is that she has prevented fishing for subsistence purposes even for the short period involved since the instituting of these proceedings in September 2005.

5.1.16 Another question entirely is the matter of fishing for commercial purposes. On these matters the internal regulations of Nicaragua are naturally applicable and are generally enforced.

Section 5.2

Alleged Breaches of an Alleged Right to Re-supply Border Posts

5.2.1 According to Costa Rica, she would enjoy a "right to use the River for re-supply and relief of personnel in border posts" as a corollary of her "rights and obligations to protect commerce, to safeguard the River and to defend it"[407].

5.2.2 Nicaragua has shown earlier in this *Counter-Memorial*[408], that those so-called "rights and obligations" had not the scope and object claimed by Costa Rica. Moreover, nowhere in the *Memorial* is it explained how this so-called right to re-supply and relieve personnel in the border posts would necessarily ensue from the rights and obligations emerging from the treaties in force. On the contrary:

- the obligation imposed on Costa Rica by Article IV of the 1858 Treaty to contribute to the security of the San Juan and to its defense in case of aggression is expressly limited to the *bank* of the river;
- neither this obligation nor any other argument induced President Cleveland to accept, in his Award, that Costa Rica was vested with a "right of navigation of the river San Juan with vessels of war"[409]; and,
- Costa Rica can of course comply with such an obligation by other means than by parading with weapons on a River that is under the territorial sovereignty of Nicaragua alone[410].

5.2.3 Apart from alleging a "corollary" of rights and obligations to protect the river, Costa Rica does not endeavour to base this alleged "right" to re-supply the border posts by using the River on any other legal argument.

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[407] CRM, p. 85, para. 4.107; see also, para. 4.109, p. 87, para. 4.117, or p. 130, para. 5.128.

[408] See above, paras. 4.2.28-4.2.35.

[409] CRM, Vol. 2, Annex 16, p. 98, "paragraph *Second, Dispositif*".

[410] See above, para. 3.2.9.

Hardly does Costa Rica mention *en passant* a so-called "acknowledgment" of this alleged right "through the agreement signed by the Nicaraguan Minister of Defence in Managua on 30 July 1998"[411], and imply that this could have been a customary right. Neither argument (if they must be treated as such) is well founded.

5.2.4 As for the 1998 "agreement"[412], Nicaragua has shown earlier in the present *Counter-Memorial*[413] that this joint-communiqué between authorities not vested in any case with full powers was finally never accepted by the Nicaraguan Government[414] and never entered into force – even under the hypothesis that it was conceived as a treaty which was not the case. Moreover, even if this document could be of any legal significance, *quod non*, the right claimed by Costa Rica was far from being unqualified:

- a previous notice from the re-supplying vessels was to be given to the Nicaraguan authorities;
- the crew could only carry their "normal weapons" ("*armas de reglamento*") and no mention was made of the transfer of weapons to or from the re-supplied posts or their personnel;
- they were to be accompanied, at Nicaragua's discretion, by Nicaraguan military[415] authorities ("*autoridades militares nicaragüense*"); and
- ought to report to the Nicaraguan posts throughout their journey along the San Juan River.

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[411] CRM, p. 85, para. 4.107.
[412] CRM, Vol. 2, Annex 28.
[413] NCM, paras. 3.2.9-3.2.10.
[414] NCM, Annex 68. Resolution of the Republic of Nicaragua's National Assembly on the Joint Communiqué Cuadra – Lizano, 30 July 1998. Ordinary Session # 5. Managua, 18 August 1998.
[415] The word "military" ("militares") is missing in the English translation provided by Costa Rica (see CRM, Vol. 2, Annex 28, pp. 195 and 197, Third point, para. 1).

5.2.5 Significantly, even this joint communiqué of 30 July 1998 does not allude to any traditional or usual such right[416]. And Costa Rica only prudently alleges that before 1998, "Nicaragua had generally respected it"[417] and does not claim that the practice was well-settled and uniform; on the contrary, it accepts that there were "occasional incidents":

- "in the period prior to the Pact of Amity of 21 February 1949"[418];
- "again during the civil war in Nicaragua during the 1980s"[419]; and
- again from 1998 on.

5.2.6 It is also extremely revealing that the President of Costa Rica, requesting the re-establishment of the cooperation between the respective authorities in the zone of the River, did not qualify the previous practice as amounting to a "right" not even as a "general practice", but as a "*modus operandi*"[420].

5.2.7 Not only is this not a "general practice", but also this hesitant and intermittent usage clearly lacks the "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"[421]. Exactly as the customary right to fish also alleged by Costa Rica[422], this so-called right to re-supply border posts has no legal basis on any established custom. If this has happened in the past (as it could happen in the future) then it has been so with the consent of Nicaraguan authorities, as an act of pure tolerance, not as of right.

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[416] The declaration by Nicaraguan Minister of Defence Jaime Cuadra given that same day and quoted by Costa Rica (CRM, p. 87, para. 4.116) does not acknowledge the existence of such a practice either: it accept a traditional "transit on the river", but does not link it to any right to re-supply (see CRM, Vol. 5, Annexes 141 and 143).

[417] CRM, p. 85, para. 4.111.

[418] CRM, p. 86, para. 4.115. and CRM, Vol. 2, Annex 23.

[419] CRM, p. 86, para. 4.115.

[420] CRM, Vol. 3, Annex 64. Letter of President of Costa Rica to the President of Nicaragua, 28 June 2000.

[421] ICJ, Judgment, 20 February 1969, *North Sea Continental Shelf Cases*, *ICJ Reports* 1969, p. 44, para. 77; see above, para. 5.1.6.

[422] See above, Section 1.

5.2.8 This "tolerance" was never based on a general consent nor did it amount to acquiescence by the Nicaraguan authorities. Costa Rica's President, Miguel Ángel Rodríguez, recognized that the "*modus operandi*" consisted, in the relevant period, in allowing Costa Rican police forces "to navigate on this waterway....*having previously informed the Nicaraguan authorities in each case*"[423]. Similarly, the President of Nicaragua described the *modus operandi* in question as "the cooperation that Nicaragua offered Costa Rica for the purpose of provisioning their border posts in the lower part of the San Juan River, thus allowing the Costa Rican police authorities to navigate that part of the river, *with the acquiescence, in each case, of the Nicaraguan authorities [con la adquiesencia, en cada caso, de las autoridades nicaragüenses]*"[424]. It will be apparent that the practice invoked by Costa Rica was thus only followed on a case by case basis, and, in each case, with the express consent of the competent territorial sovereign, i.e. Nicaragua.

5.2.9 Indeed, Costa Rica insists that the question of re-supply of police posts must not be presented in terms of a *need* but of a so-called *right*[425]. As shown before, no such right exists. But even from a factual point of view, it is not true that "there are no other practicable means to achieve [the same result] by land" [426] or air. As often recalled by Nicaraguan officials[427], Costa Rica possesses all the necessary roads or good tracks and airplane landing strips to that effect, not to speak of evident possibilities to re-supply some less easily accessible posts by helicopter[428].

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[423] CRM, Vol. 3, Annex 64. Letter of 28 June 2000, (emphasis added).

[424] CRM, Vol. 3, Annex 65. Letter of 29 June 2000, (emphasis added); see also CRM, Vol. 3, Annex 67. Letter of 3 August 2000.

[425] See CRM, p. 130, para. 5.128.

[426] CRM, p. 85, para. 4.108.

5.2.10 It is also remarkable, in this regard that the Costa Rican authorities were able to re-supply her border post during the rather long periods of time during which the *modus operandi* did not operate and a re-supply by the waterway was not possible. Also of interest is that Costa Rica deliberately decided not to raise the issue of navigation to re-supply her border posts and to abstain from such activities during the three years during which the situation was frozen following the Alajuela Declaration in 2002[429]. In connexion with the conclusion of said accords, Costa Rica's Minister of Foreign Affairs, Mr. Tovar, underlined that "armed civil guard navigation will not be an issue to be dealt with during the period mentioned in the above paragraph [i.e. three years]"[430]. This shows that, first, the Costa Rican authorities themselves were not convinced about the existence of a "right" to navigate the river for the purpose of re-supplying the border posts[431], and, second, that there exist other ways and possibilities to secure the re-supplying.

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[427] See the quotes in CRM, p. 86, paras. 4.111-4.113, or pp. 129-130, paras. 5.126-5.127.

[428] NCM, Annex 91. Affidavit of Army Colonel Ricardo Sánchez Méndez, ("He knows that the Costa Rican Civil Guard usually re-supplies its posts by land, for which purpose they have feeder roads, and he has even observed that a highway is being built in their territory, running parallel to the San Juan River").

[429] CRM, Vol. 2, Annex 29.

[430] NCM, Annex 45. Note DM-300-02, 26 September 2002.

[431] See also President Pacheco's public declaration of 19 May 2002; "We must understand that it is absurd that a country with no army is fighting over the passage of armed persons on a navigable river that is drying up …" *La Nación*, 19 May 2002, NCM, Annex 81.

5.2.11 Costa Rican complaints that supply and relief of personnel at certain police posts are very difficult or even impossible[432] seem therefore to be greatly exaggerated. Now, admitting that the prohibition by Nicaragua of the use of the river for re-supplying purposes makes this activity more difficult for Costa Rica, it would not entail any responsibility for Nicaragua. As explained by the International Law Commission in a different context, in its commentary of Article 18 of the Articles on State Responsibility, on the effect of coercion of another State, "[i]t is not sufficient that compliance with the obligation is made more difficult or onerous … It is not enough that the consequences of the coerced act merely make it more difficult for the coerced State to comply with the obligation"[433].

5.2.12 Indeed this does not correspond to the exact situation in the present case, since (i) Nicaragua has no intention to coerce Costa Rica whatsoever; and (ii) the decisions of the Nicaraguan authorities do not infringe any obligation bearing upon them. However, *mutatis mutandis*, it is certainly true that the same idea can be transposed here: Costa Rica cannot complain of the exercise by Nicaragua of her sovereign authority over the waters of the San Juan river insofar as this exercise does not breach a right belonging to her neighbouring State, even if it might make the re-supplying or relief of some post guards "more difficult or onerous".

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[432] CRM, pp. 127-128, para. 5.121-5.122.

[433] Report of the International Law Commission of the Work of its Fifty-Third Session, (23 April-1 June and 2 July-10 August 2001), *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10* (A/56/10), p. 166, para. 2) of the commentary.

Section 5.3

Alleged Breaches of the Alleged Right of Costa Rican Vessels not to Carry the Flag of Nicaragua in the Waters of the San Juan River

5.3.1 The Government of Costa Rica has expressed its disagreement with the requirement of Nicaraguan authorities that Costa Rican vessels should carry the Nicaraguan flag while navigating the San Juan River. In the *Memorial*, she affirms that "Costa Rica's perpetual rights (...) entitle Costa Rican vessels to carry the Costa Rican flag while navigating..."[434]

5.3.2 International practice confirms that vessels authorized to navigate the territorial waters of another State – and such is the case of the San Juan River, should carry the flag of the territorial or recipient country.

5.3.3 Nicaragua has always maintained that such obligation is derived not only from international courtesy, but from international practice. In a Note to the Government of Costa Rica, the Government of Nicaragua recalls that:

> "...as regards international maritime navigation, every ship entering the sovereign waters of another State raises the flag of that State, in keeping with international custom and courtesy, so that the latter is hoisted higher than that of the vessel's national flag. This act is considered one of respect and recognition of the exercise of sovereignty on the said waters. If the vessel does not hoist the flag of the State in whose waters it finds itself, it may not raise its the national flag"[435].

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[434] CRM, para. 5.91.

[435] CRM, Vol. 3, Annex 72. Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs and Worship of Costa Rica on 3 August 2001. See also NCM para. 1.3.33.

5.3.4 *In conclusion*, it appears that none of the rights other than the right of free navigation on the river San Juan de Nicaragua "with articles of trade [*con objetos de comercio*]" alleged by Costa Rica exists and, *a fortiori*, belongs to that country:

(i) Nicaragua has tolerated fishing by Costa Rican residents for subsistence purposes but this tolerance has not created any customary right for the Claimant, nor does such a right exist under general international law;

(ii) similarly, during certain periods, Nicaragua has accepted the re-supplying of certain Costa Rican border posts by the river, but this was done on a case by case basis and, in each case, with the express consent of Nicaragua, which keeps full sovereignty over the river; and

(iii) for this very reason, Costa Rican boats must carry the Nicaraguan flag when they navigate on the river San Juan de Nicaragua.

CHAPTER 6

COSTA RICA'S RESPONSE TO NICARAGUA'S POLICY OF COOPERATION AND GOOD NEIGHBOURLINESS

The Attempts by Costa Rica to Revise the 1858 Treaty by Indirect Means

INTRODUCTION

6.1.1 Nicaragua has long had a policy of cooperation with her neighbors, has regularly extended courtesies to them, and followed a principle of good neighborliness toward countries in the region. Nicaragua follows these policies because she is convinced they are principled and right, not out of any sense of legal obligation. Unfortunately, Costa Rica has repaid the good will shown by Nicaragua by repeatedly, in a variety of sectors, engaging in patterns of conduct designed to enlarge her existing rights or even to establish new ones.

6.1.2 This Chapter will offer illustrations of instances in which Nicaragua has attempted to be accommodating toward Costa Rica, only to be repaid by assertions of new rights by the latter (Section 1). It will then focus upon the issue of "facilitation of traffic on the river" raised by Costa Rica in her *Memorial*.[436]

Section 6.1

Nicaragua's General Policy of Cooperation

6.1.3 This Section will offer, for purposes of illustration, two examples of the way in which Costa Rica responds to Nicaragua's policy of cooperation and good neighborliness. The responses by Costa Rica are part of a strategy designed to enlarge her rights of navigation and other forms of use of the San Juan de Nicaragua River. In these instances and others, Costa Rica has taken advantage of Nicaragua's good-faith efforts to accommodate Costa Rican requests. Costa Rica's pattern of conduct, or *modus operandi*, in these cases has been as follows: She first requests that Nicaragua grant her permission, within the framework of courtesies and cooperation, to engage in a given form of conduct on the river. Nicaragua grants the requested permission. This process is repeated several times. Costa Rica then engages in the conduct without requesting or receiving any form of permission. Nicaragua responds by enforcing her laws and protecting her sovereign rights under the 1858 Treaty and the Cleveland Award. Then Costa Rica accuses Nicaragua of violating the 1858 Jerez-Cañas Treaty.

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[436] CRM, paras. 4.121-4.123.

6.1.4 This Section will describe two instances of this pattern of conduct, one relating to armed navigation on the San Juan and the other involving an annual pleasure-boating rally. In each of these cases, Costa Rica has attempted to convert activities it could engage in only with Nicaragua's permission into activities it may engage in as of right.

A. ARMED NAVIGATION

6.1.5 This story begins with the aftermath of the Nicaraguan civil strife in the 1980s and ends with events in the early part of this century. Unfortunately, however, the pattern of Costa Rican conduct described here has continued.

6.1.6 In the context of the security-related problems relating to the remnants of the irregular forces, on 8 September 1995 the Nicaraguan Army and the Costa Rican Ministry of Public Safety signed a Joint Communiqué,

> "[w]ith a view to complying with the National Defence missions, in addition to those of the Defence of Territorial Integrity, Independence and Sovereignty conferred by both countries' respective Constitutions and, with the aim of joint operations that contribute to the peace and stability of the border sectors common to both nations."[437]

6.1.7 By virtue of this Communiqué, the forces of the two States agreed to "coordinate, as of this date, the operational plans that involve our authorities and allow for the necessary development of joint, parallel patrolling at the border of both countries… following the exchange of information and planning carried out by both parties."[438]

6.1.8 It will be noted that this Communiqué contemplates normal activities regarding neighborly cooperation in border areas. It in no way focuses upon the San Juan of Nicaragua River or implicates its juridical regime.

6.1.9 However, after receiving appropriate requests from the Costa Rican Authorities, Nicaragua allowed vessels of this State to supply her border posts during the period 1995-1998. These permits were suspended when Costa Rica began to abuse of this relaxation of controls by, among other things, patrolling the River in order to intercept illegal immigration.

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[437] CRM, Vol. 2, Annex 27. Joint-Communiqué, Cuadra Lacayo–Castro Fernández, 8 September 1995.

[438] *Ibid.*

6.1.10 It is interesting to note that when Nicaragua suspended the navigation permits it had been granting Costa Rica, due to the manner in which the limited permission to navigate had been violated, the Yearbook of the Costa Rican Ministry of Foreign Relations and Worship Affairs for 1998-1999 announced that it would prohibit the navigation of vessels belonging to the Nicaraguan armed forces on the Colorado River.[439] This confirms Costa Rica's attitude that navigation on the San Juan to supply border posts was permissive only, not a matter of right, for which Costa Rica could extend or deny like courtesies with respect to navigation on the Colorado River, both banks of which are in Costa Rican territory.

6.1.11 Despite Nicaragua's withdrawal of permission, in 1998 the Ministry of Tourism of Nicaragua discovered a heavily armed Costa Rican patrol navigating on the lower San Juan River without permission from Nicaragua. The press described this situation under banner headlines on their front pages.

6.1.12 In his speech to the Organization of American States in 2000, quoted at length in Costa Rica's *Memorial*,[440] Minister Rojas of Costa Rica also made reference to the invasive functions of these vessels, which are without any basis in the 1858 Treaty or the Cleveland Award, including the prevention of "illegal immigration, drug trafficking and other aspects involved in border control,"[441] using Nicaraguan waters. As noted earlier, Costa Rica is of course entirely free to take whatever measures of prevention she deems necessary in respect of these illegal activities – but within her own territory, not in that of Nicaragua. As indicated in Chapter 3, Section 1, mere convenience does not create rights.

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[439] Yearbook of Ministry of Foreign Affairs of Costa Rica, 1998-1999, p. 35. Annual Report of the Ministry of Foreign Affairs and Worship, presented to the Legislative Assembly in May 1999. Roberto Rojas López, Minister of Foreign Relations and Worship. NCM, Annex 78.

[440] CRM, para. 4.93.

[441] CRM, Vol. 6, Annex 228. Ordinary Session of the OAS, 8 March 2000, approved in the session of 18 May 2000.

6.1.13 On 15 July 1998, the Minister of Home Affairs, Police and Public Safety of Costa Rica, Juan Rafael Lizano, sent a note to the Nicaraguan Minister of Home Affairs, José Antonio Alvarado, once again raising the matter of re-supplying and re-staffing border posts:

> "our public forces have been hindered from navigating on the San Juan River carrying regulation weapons in activities related to the provisioning and changing of the guard at the posts located on the right bank of said rivers, in Costa Rican territory… I reiterate that… the only means of access in some cases is the San Juan River, reason for which the activity of provisioning and changing our border guards finds itself absolutely impaired by the unilateral decision taken by Nicaraguan authorities. As you know, the inhospitable and dangerous border zone obliges our police to carry regulation weapons for their personal safety and that of the vessel carrying supplies."[442]

6.1.14 The note goes on to say that "the vessels used for the activities described earlier do not bear artillery and the weapons used by our police officers form part of their endowment of personal supplies, and in no way run counter to the bilateral international norms in force regarding the use of this waterway."[443] However, neither here nor elsewhere in the note did Minister Lizano attempt to characterize these craft as vessels of the revenue service or link their activities with articles of trade, the *sine qua non* for navigation by Costa Rican public vessels on the San Juan. Once again, the argument seems to be that because Costa Rica decided to establish border posts at locations where "the only means of access… is the San Juan River", Nicaragua must allow Costa Rica to navigate on the river with public, armed vessels to re-provision them. But the fact that Costa Rica has put herself in a difficult situation does not oblige Nicaragua to come to her aid, much less create rights in Costa Rica to navigate in Nicaraguan territory where none otherwise exist.

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[442] NCM, Annex 42. Note of 15 July 1998.
[443] *Ibid.*

6.1.15 On 28 August 1998 the interim Nicaraguan Minister of Foreign Affairs reminded his Costa Rican counterpart of the limited nature of Costa Rica's right of navigation on the San Juan: "by means of the Jerez-Cañas Treaty, Nicaragua granted Costa Rica a right of free navigation *con objetos de comercio* [with articles of trade], an not an unrestricted right. Any form of navigation undertaken by Costa Rica in the waters of the San Juan River that does not correspond to navigation *con objetos de comercio [*with articles of trade]… should be expressly authorized by Nicaragua… "[444]

6.1.16 The President of Costa Rica appears to have accepted in the year 2000 that this was the correct position. On 28 June 2000 Costa Rican President Miguel Ángel Rodríguez wrote to the President of Nicaragua, stating that:

> "…Costa Rica's intention in this respect is that the *modus operandi* that functioned temporarily prior to July 1998, by which it was allowed to navigate on this waterway with vessels carrying Costa Rican police, having previously informed the Nicaraguan authorities in each case, be reestablished. For its parts, Costa Rica is more than willing to not navigate the San Juan River with police carrying their police equipment without having informed the

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[444] CRM, Vol. 3, Annex 51. Carlos Roberto Gurdian to Don Roberto Rojas López, 28 August 1998.

> authorities of Nicaragua in that area previously, each time they patrol the San Juan...."[445]

6.1.17 The President of Nicaragua replied positively on the next day, 29 June 2000, stating that he was:

> "willing to reestablish the cooperation that Nicaragua offered Costa Rica for the purposes of provisioning their border posts in the lower part of the San Juan River, thus allowing the Costa Rican police authorities to navigate that part of the river, with the acquiescence, in each case, of the Nicaraguan authorities. Said navigation would not involve, as it did not do previously, the exercising of any act of jurisdiction, neither will it adversely affect Nicaragua's authority as territorial sovereign.
> Nicaragua's willingness to this effect is based on the desire to strengthen the ties of friendship and cooperation that should prevail between our sister and neighbouring nations, which share common historic backgroung."[446]

6.1.18 The Nicaraguan President thus made clear Nicaragua's willingness to renew the courtesies it had previously extended, *ex gratia*, to Costa Rica, while being careful to state explicitly that Nicaragua's permission would be required in each case, and that the navigation in question would not involve the exercise of any jurisdiction by Costa Rica on the river or otherwise impair the full exercise of Nicaragua's sovereignty.

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[445] CRM, Vol. 3, Annex 64. President Miguel Miguel Ángel Rodríguez to President Arnoldo Aleman Lacayo, 28 June 2000.

[446] CRM, Vol. 3, Annex 65.

6.1.19 While nothing came of it immediately,[447] the exchange of notes between the two presidents holds several lessons. First, the President of Costa Rica accepted in his note of 28 June 2000 that Costa Rica did not have a right to navigate on the San Juan with "police and their police equipment" without informing "Nicaraguan authorities...each time they patrol the San Juan."[448] Indeed, in a later note he stated, referring to the rights of Costa Rica and Nicaragua under the 1858 Treaty and the Cleveland Award, that "since 1888 nothing has occurred to change this legal status"[449] Second, it is clear from the 29 June 2000 note of the President of Nicaragua that Costa Rica had no right to navigate on the San Juan for the purpose of provisioning border posts but that Nicaragua was willing to consider allowing Costa Rican police authorities to travel on the lower San Juan for the purpose of provisioning the posts on that part of the river so long as they were given permission in each case by the Nicaraguan authorities.[450] And third, in Costa Rica the exchange of notes between the two presidents was submitted to the Fourth Constitutional Court, which indicated that it found nothing in the note of 28 June 2000 sent by President Rodríguez that ran counter to Costa Rica's position:

> "VIII. – Conclusion. On the basis of the foregoing arguments, this Court concludes that the diplomatic note

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[447] See the note of the President of Costa Rica to the President of Nicaragua of 29 July 2000, CRM, Vol. 3, Annex 66, (stating that "it has still not been possible to reach an agreement on the reestablishment of the *modus operandi*, or on the procedures by which Costa Rica, in each case, would inform Nicaragua, respectively, of the transit of Costa Rican police on the lower San Juan.") and the response of the President of Nicaragua of 3 August 2000, CRM, Vol. 3, Annex 67 (stating that "leaving pending situation that require, on our part, the concurrence of other Powers of State, in accordance with our internal legislation.").

[448] CRM, Vol. 3, Annex 64.

[449] Note of the President of Costa Rica to the President of Nicaragua of 29 July 2000, CRM, Vol. 3, Annex 66

[450] See also the Note of the President of Nicaragua to the President of Costa Rica of 3 August 2000. CRM, Vol. 3, Annex 67, in which the former indicates that "Said consent, in each of the cases, is to be expressed by the national authorities fully exercising their sovereign attributes."

> sent by the President of the Republic of Costa Rica on 28 June 2000 to the President of Nicaragua, is not unconstitutional, and consequently declares the present action [of unconstitutionality] without basis, dismissing it from the Court."[451]

6.1.20 Finally, the rich diplomatic history of the parties shows that it would be entirely illogical to suppose that a right of such importance as one of armed navigation by Costa Rica in Nicaraguan territory would not have been directly and clearly established in the Treaty if this had been the intent of the parties. The long history of treaty relations based on the 1858 Treaty between the two countries clearly shows that whenever Costa Rica and Nicaragua mutually intended to grant a right, that right would be expressly stated. Thus, for example, the 1869 Montealegre–Jiménez Treaty, in Article 12, [452] and the Carazo–Soto Treaty of 26 July 1887[453] (neither of which was ratified by Nicaragua[454]) contained clauses regarding fiscal matters but clearly excluded armed forces.

6.1.21 Further evidence of this practice of precise and explicit statement of treaty rights is provided by former President[455] of Costa Rica Don Ricardo

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[451] NCM, Annex 66.

[452] Montealegre-Jimenez Treaty of 18 June 1869; Article 12 "…The Republic of Costa Rica may open such roads even in Nicaraguan territory and navigate on the rivers in that territory, for the purpose of transporting and introducing its agricultural, industrial and commercial products to the canal. *Nicaragua may not impede in any way whatsoever the opening of said roads*, nor the navigation of said rivers; and in the mouths of these rivers, Costa Rica may establish customs and warehouses at the expense of the State… after having informed the Government of Nicaragua; *in no case, however, may Costa Rica place armed forces there*, but only the employees necessary for the custody and security of the country's customs and warehouses, and vice versa…" (Emphasis added). NCM, Annex 8.

[453] Carazo-Soto Treaty, 26 July 1887, CRM, Vol. 2, Annex 15.

[454] NCM, Annex 34. Telegram of 28 September 1887, from Pedro Gonzalez, Minister of Foreign Affairs of Nicaragua, to the Minister of Foreign Affairs of Costa Rica.

[455] President of the Republic of Costa Rica for three presidential periods: 1910-1914, 1924-1928 and from 1932-1936.

Jiménez Oreamuno. In his memoire *Su pensamiento*, President Jiménez Oreamuno wrote of the Cleveland Award:

> "The New York [news media] criticizes the decision because it does not give us the right to navigate on the San Juan with vessels of war. I would say that this criticism is unfounded. The emphasis with which Article 6 of the treaty allocates that Nicaragua shall have *dominion and sovereignty* over the waters of the river shows that the desire was to establish differences between the rights that Nicaragua and Costa Rica agreed to have over said waters. If merchant ships and vessels of war from both Republics freely and indistinctly navigate the river, then how is this shown? What practical effect will be implied in the solemn declaration that dominion and sovereignty over the waters corresponds to Nicaragua? The rest of the article corroborates this meaning. It was seen that this absolute affirmation would take away from Costa Rica any and all usage of the river, but because this was not the intention, an exception was immediately added, stipulating that Costa Rica would have perpetual rights of free navigation over said waters with 'articles of trade'. If an exception in favor of vessels of war does not also appear in the article, then the inference is logical: Costa Rica was not believed to hold such right. The argument derived from Article 4, about the obligation assumed by Costa Rica to take part in the river's defense in the event of foreign aggression, was seen as much less than conclusive. Costa Rica shall take part in this defense when the foreseen hypothesis takes place.
>
> Meanwhile, in full peace, without the slightest risk of hostilities, to pretend that our ships of war navigate the river in order to take part in a defense provoked by no attack is to arrive at the subtlety with which the Nicaraguans have examined the treaty. Through Article 4, Costa Rica was obliged to defend the San Juan as an ally of Nicaragua. When has one seen that an ally, being an ally, purports to have the right, in the absence of war, to transit

> with its troops the allied territory to navigate with warships her interior waters or station armadas in her ports?"[456]

6.1.22 Clearly, former President of Costa Rica Jiménez Oreamuno acknowledges here not only the limited sense of the rights granted to Costa Rica with respect to navigation with articles of trade, but also and especially the fact that Costa Rica cannot claim for herself any other or different rights that were not expressly stipulated in the treaty.

6.1.23 To conclude this subsection, the practice and other material reviewed above demonstrates a recurring pattern of conduct by Costa Rica that is, from all external appearances, designed to expand existing rights of navigation on the San Juan or create new ones. First, Costa Rica requests permission from Nicaragua to navigate on the San Juan in a manner that is inconsistent with the 1858 Treaty. Then she engages in such navigation without Nicaragua's permission. Finally, when Nicaragua protests the latter conduct Costa Rica alleges that Nicaragua has violated a right contained in the 1858 Treaty and the Cleveland Award. But the practice also shows that each time she has sought to create new navigational rights, Costa Rica has ultimately accepted Nicaragua's assertions of her own rights under the Treaty and Award, assertions that Nicaragua has consistently made whenever Costa Rica has exceeded her rights under the juridical regime of the river.

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[456] Don Ricardo Jiménez Oreamuno, *Su pensamiento*, Editorial Costa Rica, San José, Costa Rica 1980 p. 55.

B. PLEASURE BOATING

6.1.24 Pleasure boating is, of course, a far less serious matter than armed navigation. Nevertheless, even pleasure boating is an activity that must respect principles of sovereignty and territorial integrity. The pattern of Costa Rican conduct that will be described in this subsection shows how that country uses even recreational activity to try to create, incrementally, new navigational rights.

6.1.25 This particular practice began in 1993, when the Nautical Sports Association (ADENA), a private, non-profit entity, applied to the Embassy of Nicaragua in San José for permission to hold its nautical rally on the San Juan River.[457] Nicaragua granted authorization by means of a special document signed by the Nicaraguan Ambassador to Costa Rica and by the Director of Commerce, Cooperation and Tourism at the diplomatic mission, which stated in part as follows:

> "The Ministry of Foreign Affairs acknowledge receipt of said request and declares that in exercise of the sovereignty and supreme control that Nicaragua exercises on the San Juan River, and in answer to the request presented, the Chancellery of the Republic [of Nicaragua], on this occasion, has decided to grant the corresponding AUTHORIZATION for the holding of the tourist Rally with regard to the Trinidad – El Delta stretch.
> Further, it is necessary to inform the Costa Rican Nautical Association of Sport (ADENA) that it will be the responsibility of the organizers of the event, as well as of the participants in it, to properly handle garbage, plastic waste and oil, to avoid contamination and any damage to the environment in which the competition will be held.

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[457] NCM, Annex 39. ADENA note from Julio Martin (Director) to the Ambassador of Nicaragua, Alfonso Robelo, 27 September 1993.

> We hope that in the future any similar request will be presented sufficiently in advance in order to analyze them and give an adequate reply"[458]

6.1.26 This practice continued for seven years, from 1993 to 1999. On each occasion, ADENA applied for the pertinent permits and they were granted by Nicaragua.

6.1.27 Then, in 2000, ADENA decided to navigate without permission. On 26 October 2000, Foreign Minister Roberto Rojas of Costa Rica denounced the events which allegedly took place on 21 October, when military authorities of the Republic of Nicaragua "precluded the realization of the VII International Nautical Rally Sarapiquí River / San Juan River, on the waters of the San Juan River."[459] The note declared that this act constituted a serious violation of Costa Rican rights to free navigation as set forth in the Jerez-Cañas Treaty, the Cleveland Award and other instruments governing the matter.

6.1.28 This protest of Costa Rica, relating to an activity that had nothing to do with articles of trade (or even revenue vessels), clearly betrays Costa Rica's strategy of attempting to transform permission granted in the framework of cooperation and good neighborliness into an obligation derived from the 1858 Treaty.

6.1.29 In the case of the annual pleasure boating rallies, however, the Costa Rican strategy was interrupted by a change of government. In 2003 ADENA once again applied for permission from the Embassy of Nicaragua to hold its rally by means of notes.[460]

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[458] NCM, Annex 40. Note of 8 October 1993.

[459] NCM, Annex 44. Note DM-332-2000, 26 October 2000.

6.1.30 The Government of Costa Rica, which had protested to Nicaragua in the year 2000, could not possibly have been ignorant of these petitions, considering that the letters sent by ADENA, such as that dated 8 June 2005,[461] were sent with copy to the Costa Rican Minister of Foreign Relations, as well as to the Minister of Public Safety, both institutions that were direct actors in the protests of the year 2000. Yet it did not maintain that the pleasure boats participating in the ADENA rally had any right to navigate on the San Juan.

6.1.31 To conclude this Subsection, the ADENA case serves once again to illustrate the Costa Rican strategy of "fabricating" rights. First permission is requested, then action is taken without permission. Faced by the logical negative reaction on the part of Nicaragua, Costa Rica thereupon alleges a violation of her rights under the 1858 Treaty.

CONCLUSION

6.1.32 This Section has provided illustrations of the manner in which Costa Rica repays Nicaragua's efforts at cooperation and, generally, being a good neighbor: with a strategy designed to create rights of navigation on the San Juan de Nicaragua River that are provided for neither in the 1858 Treaty nor in the Cleveland Award. The Section has focused on two categories of conduct – armed navigation and pleasure boating – but others could be cited as well. In each of these areas, Costa Rica has attempted to convert activities it could engage in only with Nicaragua's permission into activities it may engage in as of right. The same situation obtains in respect of the present case. Costa Rica consistently attempts to enlarge the carefully restricted navigational rights she enjoys under the 1858 Treaty and the Cleveland Award. Nicaragua's policies of cooperation and good neighborliness should not be repaid by efforts to acquire rights in her territory. Certainly, nothing either Costa Rica or Nicaragua has done or failed to do to date establishes the rights Costa Rica claims.

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[460] For example, in a noted dated 14 July 2003 ADENA requests "assistance in obtaining the authorization of the Government of your country through its different Ministries, specifically the Immigration and Naturalization Service, the Army, the Ministry of Natural Resources and any other you may consider appropriate. Likewise, were it possible, and considering that this is a sporting event, we request that you intercede on our behalf so we might be exempted from charges for visas (Migration) and clearance certificate fees (Army)." NCM, Annex 46.

[461] Letter of 8 June 2005 from the President of ADENA to Dr. Francisco Fiallos Navarro, Ambassador of Nicaragua to Costa Rica, NCM, Annex 49.

6.1.33 More generally, Nicaragua's good-faith efforts to cooperate with Costa Rica, specifically in the border zone, are illustrated by the Alajuela Declaration of 26 September 2002, and subsequent related communications. In her *Memorial*, Costa Rica acknowledges that this instrument "was intended to permit other areas of the bilateral agenda to be advanced, regardless of the ongoing dispute relating to the San Juan"[462], and that it "was an important step towards improving bilateral relations."[463] Indeed, in the Declaration's Preamble the Foreign Ministers of the two countries record that they "Note[] the importance of deepening cooperation between the two States for the sustainable development of the border region, including the establishment of a special development fund;" and "Bear[] in mind that the strengthening of our good-neighbourly relations is essential to the energetic promotion of Central American economic and cultural integration and the sustainable human development of our countries for the benefit of our peoples;..."[464]

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[462] CRM, para. 3.44

[463] *Ibid*, para. 3.45.

6.1.34 Costa Rica further acknowledged, through a note from her Foreign Minister to the Foreign Minister of Nicaragua of 28 September 2005, that at the time of the Alajuela Declaration the two countries "agreed to promote… [*inter alia*], a Programme of border development to strengthen the economic and social conditions of the inhabitants of an area that should always be one of cooperation and never one of confrontation."[465] The Foreign Minister of Costa Rica then recognized that, "Today, as a result of an atmosphere of respect, fraternity and mutual trust, we have made those aspirations a reality of opportunities, that we must continue increasing."[466] (He then proceeded to inform Foreign Minister of Nicaragua that Costa Rica was bringing the present case before the Court.)

6.1.35 In these communications Costa Rica clearly recognizes the spirit of cooperation and good neighborliness displayed by Nicaragua in relation, *inter alia*, to the border area, extending up to the filing by Costa Rica of the Application in the present case. That spirit, in fact, continues to the present day. These documents thus demonstrate, contrary to the impression Costa Rica seeks to create, Nicaragua's sensitivity toward, and determination to take measures to address, the social and economic needs of the population living in the border area, including those in the vicinity of the San Juan de Nicaragua River. Some of these measures are being taken, in the form of concrete projects, and yielding positive results.

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[464] Alajuela Declaration, Caldera -Tovar, 26 September 2002, CRM, Vol. 2, Annex 29.
[465] Note from the Minister of Foreign Affairs of Costa Rica to the Minister of Foreign Affairs of Nicaragua, 28 Sept. 2005. CRM, Vol. 3, Annex 80.
[466] *Ibid.*

6.1.36 Unfortunately, Costa Rica, for her part, did not indicate any disposition to engage in dialogue concerning the matters referred to in the Alajuela Declaration. Instead, she only sought an extension of the Declaration and never complied with the commitment in its paragraph 1 to facilitate the "free movement across their common border by means of a temporary entry or exit permit"[467] or eliminated the visa fee as called for in paragraph 2.

6.1.37 This record suggests, once more, that Nicaragua's efforts to cooperate in good faith with her neighbor for their mutual benefit have been repaid not with corresponding cooperation by Costa Rica but instead by a single-minded focus on Costa Rica's interests – here, on the aspect of the Alajuela Declaration that Costa Rica regarded as being to her individual benefit..

Section 6.2

Nicaragua's Facilitation of Traffic on the River

6.2.1 Costa Rica contends in her *Memorial*[468] that a 1956 agreement between the two countries provides "evidence of the existence of the right of navigation for the purpose of transport of passengers in accordance with the Treaty of Limits and the Cleveland Award and constitutes an additional basis for the improvement of the conditions for its exercise."[469] This allegation ignores entirely not only the terms of the 1956 treaty but also its historical context and its object and purpose, which have to do with regional security.

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[467] CRM, Vol. 2, Annex 29.

[468] CRM, paras. 4.121-4.123.

[469] CRM, para. 4.122.

6.2.2 The impetus for the 1956 treaty was the presence of irregular forces operating in the territories of Costa Rica and Nicaragua in an effort to destabilize their respective governments. The Agreement's preamble indicates that it was concluded "in the presence of the Chairman and other Members of the Council of the Organization of American States."[470] Indeed, as further indicated in the preamble, the Council of the OAS, acting provisionally as the Organ of Consultation, had appealed to the two Governments to sign the Montevideo Convention on the Rights and Duties of States in the Event of Civil Strife.[471] Also in the preamble, the two countries "recogniz[e] the effective efforts to bring about peace made by the Council of the [OAS] acting provisionally as the Organ of Consultation"[472]

6.2.3 In short, the preamble of the Agreement makes clear that the object and purpose of the treaty is to strengthen cooperation in order to prevent civil strife. There is nothing in the preamble indicating that one of the desiderata for concluding it was to create any new rights of either party in the territory of the other. In fact, the clear implication is the opposite, in view of the Agreement's object of forestalling transborder armed activities. For example, Article II provides in relevant part as follows:

> "The two Parties shall, in so far as possible and with the utmost diligence, arrange for the supervision of their common border as a means of preventing the illegal entry

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[470] Agreement between the Governments of the Republics of Costa Rica and Nicaragua Pursuant to Article IV of the Pact of Amity signed on 21 February 1949, 9 January 1956, Preamble, 1465 U.N.T.S. 233, CRM, Vol. 2, Annex 24.

[471] 134 L.N.T.S. 45.

[472] CRM, Vol. 2, Annex 24.

> of either weapons or armed groups from the territory of one of the Parties into the territory of the other."[473]

6.2.4 The focus of the Agreement on insurrectionary activities is also illustrated by Article III, whose first paragraph provides: "Each Party undertakes to apply the necessary measures to prevent revolutionary movements from being fomented or from rising up in its territory against the other Party."[474] If this is what motivated the parties to conclude the Agreement, why would they create new rights, in "enterprises which are the nationals of the other [Party]"[475] or otherwise, to transport individuals into their territories? Such a motivation is against all logic.

6.2.5 In addition, the Agreement regulated such issues as territorial asylum and extradition. Article II, an excerpt from which is set forth above, also established a scheme of cooperation between the border authorities of the two countries. Border Committees were set up, whose functions included coordination of joint surveillance along the common border and prevention of any incident that might disturb the harmony between the two States.

6.2.6 Apart from the fact that this agreement deals with civil strife and other forms of armed conflict, not commerce on roads or waterways, the provision quoted by Costa Rica as the basis for her claimed right, Article I of the 1956 Agreement, fails utterly to support Costa Rica's contention. Article I reads as follows:

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[473] CRM, Vol. 2, Annex 24.
[474] *Ibid*. Article III, para. 1.
[475] *Ibid*, Article I.

> **"The two Parties, acting in the spirit which should move the members of the Central American family of nations, shall collaborate to the best of their ability in order to carry out those undertakings and activities which require a common effort by both States and are of mutual benefit and, in particular, in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888, and also in order to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other."[476]**

6.2.7 It is difficult to see how this provision supports a claimed right in Costa Rica to transport passengers on the San Juan. The obligation to "facilitate and expedite traffic on the … San Juan River within the terms of the [1858 Treaty and Cleveland Award] is just that: an obligation to *facilitate* and *expedite* any traffic that may take place on the river "*within the terms of*" – i.e., as permitted by – the Treaty and Award. It is not an obligation to *permit* traffic that is not allowed by those sources of law. Likewise, the obligation to "facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other" creates no new rights. It is an obligation to "facilitate" services which may be provided pursuant to the juridical regime of the river.

6.2.8 Costa Rica maintains: "Clearly, the 1956 Agreement imposes an autonomous obligation of best efforts in order to facilitate transport in the San Juan on both parties, which necessarily include[s] navigation by Costa Rican enterprises of transport."[477] Unfortunately for Costa Rica, this argument does not take her very far. All it says is that Nicaragua has an "obligation of best efforts in order to facilitate transport in the San Juan"

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[476] CRM, Vol. 2, Annex 24.

[477] CRM, para. 4.123.

in respect of vessels that are lawfully there – i.e., vessels carrying articles of trade, or accompanying such craft. Nicaragua has always done this in any event, irrespective of the 1956 Agreement, which creates no new rights of navigation.

6.2.9 Costa Rica has a propensity to use circumstances of this kind, which are governed by the Montevideo Convention on the Rights and Duties of States in the Event of Civil Strife,[478] as a vehicle for her efforts to expand her rights under the 1858 Treaty and the Cleveland Award. It is therefore not surprising that Costa Rica seizes upon the 1956 Agreement despite the fact that it deals with security issues that bear no relation to the 1858 Treaty or the Cleveland Award.

6.2.10 At various places in her *Memorial*, Costa Rica seeks to leave the impression that the local population living in the vicinity of the right (Costa Rican) bank of the San Juan, and others on Costa Rican territory, regularly uses the river for transportation, and that Nicaragua has allowed this to occur without requiring that the persons in question obtain permission.[479]

6.2.11 This is not the case. Consistent with the 1858 Treaty and the Cleveland Award, Nicaragua has consistently required that those from Costa Rica

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[478] 134 L.N.T.S. 45.

[479] CRM, e.g., para. 2.06, at p. 8, See also Note of Roberto Tovar, Foreign Minister of Costa Rica, to his Nicaraguan counterpart of 20 October, 2005, referring to certain measures that came to hamper and in some cases prevent "daily navigation on the San Juan River to which they have always been the accustomed." CRM, Vol.3 Annex 81. The Foreign Minister of Nicaragua replied to this Note on 9 November, 2005, emphasizing that Nicaragua adheres strictly to the legal regime of the San Juan de Nicaragua River consisting of the 1858 Treaty and the Cleveland Award, rejecting the idea that border courtesies granted to facilitate local traffic could ever constitute a legal precedent, and recalling that respect for territorial sovereignty, with all the powers and rights inherent in it, forms the cornerstone of international relations; CRM, Vol. 3 Annex 82.

obtain authorization to cross into her territory, whether on the San Juan or elsewhere. Costa Rica has repeatedly recognized this need to obtain permission. Thus, this newly claimed right of "communication" is excluded both by the legal regime of the river – the 1858 Treaty and the Cleveland Award – and by practice. Moreover, Nicaragua has not withheld permission, where the request to transit the San Juan was reasonable. The following examples illustrate these points.

6.2.12 **In a note of 19 June 2006, Dr. Thais Ching Zamora, Director of the Costa Rican Social Security Institute, a Costa Rican Public Sector Entity, requested permission from Nicaraguan Ambassador to Costa Rica, Leopoldo Ramírez Eva, *to provide public health services to the following communities close to the border: Tambor, Fátima and San Antonio. The request stated*:**

> **"We hereby request authorization from the Government of Nicaragua so that officials from the Health Unit of the Costa Rican Social Security Institute at Puerto Viejo de Sarapiquí may navigate the San Juan River to provide healthcare services to the communities of Tambor, San Antonio and... Due to the nature of our objective, we request that the issuance of a 6-month permit be considered".** [480]

6.2.13 **Similarly, the Christian and Missionary Alliance of Horquetas wrote Nicaraguan Ambassador Leopoldo Ramírez Eva requesting *permission to navigate a "small track" of the River San Juan to visit schools at Tambor and Remolinito* . The Note states:**

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[480] **NCM, Annex 51. Note of 19 June 2006, from Dr. Thais Ching Zamora, Director of the Costa Rican Social Security Institute, in Puerto Viejo, Sarapiquí, North Central Region, no. 358-2006.**

> "Our organization "Comunidad Alianza Cristiana y Misionera" is located at Horquetas de Sarapiquí and we are interested in carrying out missionary work that includes social assistance in the schools of Tambor and Remolinito and we have scheduled a trip for 7 July 2006. Since we must navigate a short distance that corresponds to the San Juan River, we request permission from you to make this journey *because we want to abide by your strict regulations in said zone.*
>
> We do not have set dates for our subsequent journeys, but we would like to have permission to navigate that short distance and we ask for a waiver on charges inasmuch as the purposes for making use of that stretch are of social interest and the aforesaid communities have few resources..." [481]

6.2.14 In both cases the Nicaraguan reply was given along the following lines:

> "Authorization to Navigate... The Embassy of Nicaragua in Costa Rica, by authorization from the Ministry of Foreign Affairs of Nicaragua, grants this special authorization to navigate on the San Juan de Nicaragua River to the boat: ... The boat must carry the Costa Rican and Nicaraguan ... [description of the boat] ... *Nicaraguan authorities have the right to cancel this permit in case of any breach of the Nicaraguan laws. Furthermore, the holders of this permit must subject to routine inspections by the respective authorities...*"[482]

6.2.15 In each case the authorization was accompanied by a Note from the Nicaraguan Embassy stating:

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[481] NCM, Annex 52. Note of 30 June 2006, from Shepard Rodrigo Zamora, of the Christian and Missionary Alliance, Horquetas, Sarapiquí, to Ambassador Leopoldo Ramírez Eva, Nicaraguan Embassy in Costa Rica.

[482] Authorization to the Costa Rican Social Security Institute, No. 01/2006, sent on 6 July 2006; NCM, Annex 89. And Authorization to the Christian and Missionary Alliance located at Horquetas in Sarapiquí, No. 02/2006, sent on 6 July 2006. NCM, Annex 90.

> "...the Ministry of Foreign Affairs of Nicaragua, a special authorization is hereby issued to navigate the San Juan de Nicaragua River for the stated purposes, which may not be used for any purpose or places other than those indicated or in breach of Nicaragua's full Sovereignty over the San Juan River .... *This permit is a gesture of friendship, good neighborhood and courtesy of good faith that may not be used in any other form or with the intent to harm Nicaragua in any manner or circumstance...*"[483]

6.2.16 The regular and consistent practice illustrated in these examples is well known to Costa Rica and has followed it in nearly all cases without protest or question. For her part, Nicaragua has consistently required that Costa Rican boats not carrying articles of trade receive advance permission to navigate on the San Juan. Costa Rica's suggestion that there is a right of "communication" between points on the Costa Rican side, using Nicaraguan territory – the San Juan River – is novel and appears to be an opportunistic attempt to add more claimed "rights" to those she has already asserted in the present case. It seems doubtful that she would claim such rights if the San Juan were land territory rather than water. Yet in either case it is the sovereign territory of Nicaragua, and Costa Rica must have permission to cross it in any way not specifically authorized by the 1858 Treaty and the Cleveland Award, as Costa Rica herself has consistently accepted.

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[483] Note of 6 July 2006, to Dr. Thais Ching Zamora, Director of the Costa Rican Social Security Institute, from Ambassador Leopoldo Ramirez Eva; NCM Annex 53 and Note of 6 July 2006, to Shepard Rodrigo Zamora, of the Christian and Missionary Alliance, from Ambassador Leopoldo Ramirez Eva. NCM, Annex 54.

CONCLUSION

6.2.17 This Chapter has dealt with difficulties that have arisen for Nicaragua from her policy of cooperation and good neighborliness toward Costa Rica. The Chapter has shown that in respect of both armed navigation and pleasure boating, Costa Rica has sought to create new navigational rights in the San Juan through a practice of abusing permission to navigate granted by Nicaragua; or establishing a pattern of requesting and receiving permission to navigate, then doing so without permission, claiming justification in the 1858 Treaty and Cleveland Award. The Chapter has shown, however, that Costa Rica's claims of new rights are unfounded. Her right to navigate on the San Juan derives solely from the 1858 Treaty and the Cleveland Award, which require that her vessels carry articles of trade or navigate with craft carrying such articles. The Chapter then turned to the issue of "facilitation of traffic on the river" raised by Costa Rica in her *Memorial*. It showed that Costa Rica's contentions in this regard are misplaced, since the treaty she relies upon creates no new rights of navigation in Costa Rican vessels; it only requires that Nicaragua use her best efforts to facilitate transport services of Costa Rican vessels that are permitted to navigate on the San Juan by the 1858 Treaty and the Cleveland Award. Finally, under the same rubric, the Chapter showed that Costa Rica's alleged right of "communication" between points on her side of the river is without foundation, as demonstrated not only by the 1858 Treaty and the Cleveland Award, but also by consistent practice reflecting her acceptance of the necessity of prior authorization to transit the San Juan River.

CHAPTER 7

REMEDIES

7.1.1 Chapter 6 of the Costa Rican *Memorial* is more of an overview of the general principles of law applicable in cases of state responsibility. Nicaragua has little to say on this matter since, as shown in this Counter-*Memorial*, Nicaragua has violated none of its international obligations vis-à-vis Costa Rica (Section 1). However, given the particular circumstances of this case, Nicaragua would request the Court to make a declaratory judgment establishing among other things that it has fully complied with the obligations incumbent upon her by virtue of the 1858 Treaty of Limits (Section 2).

Section 7.1

The Remedies Requested by Costa Rica

7.1.2 Chapter 6 of the *Memorial* of Costa Rica reviews the whole range of the "legal consequences of an internationally wrongful act" as codified by the International Law Commission in the Articles on State Responsibility annexed to General Assembly Resolution 56/82 of 12 December 2001. In general, Nicaragua has no objection of principle to accepting that this is the applicable law in case of State responsibility for an internationally wrongful act. However, for this to be the case, an internationally wrongful act – or several such acts – must have been committed. Nicaragua has shown in this *Memorial* that Costa Rica has not given evidence of the occurrence of any such act either:

- because the facts it has described are erroneous or wrongly interpreted; or;
- more often, because it made an erroneous or mistaken interpretation of the applicable law and, in particular, of the 1858 Treaty of Limits from which Costa Rica holds the only rights it possesses on the San Juan river.

7.1.3 As a result, the obligations alleged by Costa Rica either are non-existent or, when they exist, have not been breached by Nicaragua. Thus, Nicaragua has demonstrated that:

i) it has not violated and is not violating:

- the right of Costa Rica of free navigation with articles of trade [*con objetos de commercio*] as guaranteed by Article VI of said Treaty[484],
- including the right for the Costa Rican vessels to approach the northern shore of the river for that purpose (Article VI of the Treaty)[485],
- without "any class of impost" when said navigation is to this purpose (Article VI)[486]; nor
- its (in fact non-autonomous) obligation "to facilitate and expedite traffic … on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888" (Section I of the Treaty of 9 January 1956)[487];

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[484] See e.g., paras. 4.18-4.1.36.
[485] See e.g., paras. 4.1.46, 5.2.1.
[486] See e.g., para. 4.2.36.
[487] See e.g., paras. 6.2.3-6.2.16.

and that

ii) Nicaragua is under no obligation to permit navigation beyond the limits contemplated in the 1858 treaty of Limits and, thus for example, Nicaragua is under no obligation:

- to accept free landing on the Nicaraguan bank of the river when this is not done for the purposes contemplated in the Treaty;
- to allow Costa Rican official vessels to re-supply or relieve the personnel of police posts on the territory of Costa Rica[488]; or
- to permit riparians of the Costa Rican bank to fish in the River for any purposes[489].

7.1.4 Absent any breach, there can, of course, be no question of reparation or other consequence of an internationally wrongful act, including the cessation of perfectly lawful conducts. Some very brief comments on some aspects of the Costa Rican requests are nevertheless in order. The following remarks are made *arguendo* as a purely academic discussion and, of course, do not imply any recognition by Nicaragua that it has committed any of the breaches alleged by Costa Rica in the *Memorial*.

7.1.5 *Concerning the reparation* requested by Costa Rica, a striking fact is the vague and indistinct character of the alleged damages and of the requested reparation. It is true that (i) restitution is the primary form of reparation, and (ii) the form and amount of compensation can be reserved for a subsequent phase of the proceedings. But this does not mean that the Claimant in a case before the Court can simply contend that it has endured an injury without establishing the precise and effective nature of said injury and that it has been caused by the alleged internationally wrongful act or acts.

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[488] See e.g., paras. 5.1.1 - 5.1.20.

[489] See e.g., paras. 5.2.2 - 5.2.11.

7.1.6 As made clear in the commentary of the International Law Commission Articles, "[i]t is only '[i]njury … caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used [in Article 31, paragraph 2, of the Articles on States Responsibility] to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act"[490]. It belongs to the Claimant to establish both the reality of the injury and this causality.

7.1.7 It is true that, in its Judgments of 25 July 1974, in the *Fisheries Jurisdiction Case (Germany v. Iceland)*, the Court recognized that "[i]t is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings the amount of damage to be assessed"[491]. However, in that same Judgment, the Court indicated that it "is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence"[492].This is precisely the case in the present case, where Costa Rica only makes very broad assertions as to the injury allegedly endured[493] and gives no indication whatsoever as to the cause of those damages. Accordingly, the Court cannot accede to the submissions made by Costa Rica in such a cavalier form[494].

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[490] Report of the International Law Commission of the Work of its Fifty-Third Session, (23 April-1 June and 2 July-10 August 2001), Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), p. 227, para. 9) of the commentary of Article 31 ("Reparation").

[491] *ICJ Reports* 1974, p. 204, para. 76 – see CRM, p. 143, para. 6.17.

[492] *Ibid.*, p. 205, para. 76.

[493] CRM, pp. 141-142, para. 6.15.

7.1.8 Moreover, in both cases to which Costa Rica refers[495], the Court expressly indicated that it specifically based its decision on Article 53 of its Statute[496], which provides for the rules to be applied when "one of the parties does not appear before the Court, or fails to defend its case". In such a case, "the principle of the equality between the Parties requires" that the absent Party be given the opportunity "to present its arguments on the question of reparation if it so wishes"[497]. This is not the situation prevailing in the present case.

7.1.9 More specifically, Costa Rica requests, by way of restitution, "the abrogation of all legislative and administrative measures taken by Nicaragua which contradict or deny the obligations enumerated above"[498]. Such a submission is not only vague and based on insufficient evidence, which does not allow the Court to decide in full knowledge, but also there is no legal basis for the Court to award this unfounded claim.

7.1.10 It is also appropriate to note, in respect to Costa Rica's allegations concerning the "obligation" which would be incumbent upon Nicaragua "to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes"[499] and, more generally, her claims for compensation for the losses and expenses incurred by Costa Rican citizens[500], that such claims could only be made as a matter of diplomatic protection, the conditions for which are not fulfilled in the present case.

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[494] Cf. *ICJ Reports* 1974, p. 205, para. 76, and p. 206, para. 77(5) (operative paragraph).

[495] CRM, p. 143, fn. 424.

[496] Judgments of 25 July 1974, *Fisheries Jurisdiction (Germany v. Iceland)*, *ICJ Reports* 1974, p. 205, para. 76, and 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Merits)*, *ICJ Reports* 1986, p. 143, para. 284.

[497] *ICJ Reports* 1986, *ibid.*

[498] CRM, p. 141, para. 6.13.

7.1.11 *In respect to Costa Rica's request for assurances and guarantees of non-repetition*, Nicaragua notes that it seems, in recent years, to have become a usage for the Claimants before the Court to request such assurances and guarantees. It is true that, according to Article 30(b) of the ILC Articles on State Responsibility:

> "The State responsible for the internationally wrongful act is under an obligation:
>
> ...
>
> (*b*) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require".

7.1.12 However, as the text of this provision itself shows, such assurances and guarantees of non-repetition are not required in every and all circumstances. In the present case, such circumstances are certainly not present.

7.1.13 Nicaragua has constantly and consistently reaffirmed her commitment to strictly respect the 1858 Treaty of Limits[501] and this is presumably what the Costa Rican submission could aim at. This would add nothing to these firm commitments by Nicaragua or to the principle *pacta sunt servanda*. Moreover, as the Court has recalled, it "neither can nor should contemplate" the possibility that its Judgments would not be implemented

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[499] CRM, p. 139, para. 6.03(i).

[500] See CRM, pp. 141-142, para. 6.15.

[501] See e.g.: NCM Chap. 4 and 5.

by the Parties[502]. In fact, as will be shown below[503], if assurances and guarantees of non-repetition are to be decided by the Court, they should bear upon the behaviour of Costa Rica, not that of Nicaragua.

7.1.14 In paragraph 6.22 of her *Memorial*, Costa Rica seems to base her request on this point on the fact that "[t]his is the third time in history that Costa Rica has been obliged to have recourse to adjudication (arbitration by President Cleveland, the Central American Court of Justice and this Court) in order to obtain recognition and respect of her rights as first established by the Treaty of Limits". This is a very misleading hotchpotch of precedents:

- **as shown above[504], the questions asked to President Cleveland by Nicaragua and which were the object of the 1888 Award were entirely different of those submitted to the Court in the present case;**
- **the same holds true in respect to the 1916 Judgment of the Central American Court of Justice[505], which essentially related to the right of Costa Rica to be heard in respect to a canal concession in relation with Articles VII and VIII of the Treaty of Limits[506], while these provisions are of no relevance in the present case.**

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[502] **See e.g.: PCIJ, Judgment, 17 August 1923, *S.S. Wimbledon*, Series A, N° 1, p. 32; 18 September 1928, Series A, N° 17, *Factory at Chorzów (Claims for Indemnity) (Merits)*, Series A, N° 17, pp. 62-63; ICJ, 20 December 1974, *Nuclear Tests*, *ICJ Reports* 1974, p. 272, para. 60, and p. 477, para. 63, or 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction of the Court and Admissibility of the Application)*, *ICJ Reports* 1984, p. 437, para. 101.**

[503] **NCM, Chap. 7, sec.2.**

[504] **See e.g., NCM, paras. 3.1.1-3.1.26, 2.1.42-2.1.43.**

[505] **CRM, Vol. 2, Annex 21.**

[506] **See CRM, Annex 21, in particular at p. 150.**

7.1.15 Finally, Nicaragua wishes to firmly reiterate, that the remarks in this section do not amount to any kind of recognition of any violation of the 1858 Treaty of Limits as interpreted by the Cleveland Award. They have been presented to the Court only very subsidiary, in order not to let unanswered any allegation made by the Costa Rican Party.

Section 7.2

Declaration Requested by Nicaragua

7.2.1 In the present case, the subject-matter of Costa Rica's claim is defined by the Application and the submissions of the *Memorial*. It will be apparent from the reading of both documents that it is mainly concerned with the interpretation and the application of Article VI of the Treaty of Limits of 1858, which according to Costa Rica would have been violated in several respects by Nicaragua.

7.2.2 In reality, Costa Rica has followed a pattern of conduct which amounts to a global strategy of challenge of her obligations under the Treaty of Limits. As has been explained in previous Chapters of this *Counter-Memorial*, Costa Rica's strategy has consisted in trying to expand her rights under the 1858 Treaty and the Cleveland Award by all means[507]. Nicaragua wishes to take the opportunity of the present case to put an end to this strategy which periodically inflames the relations between the sister Republics. A Judgment of the International Court clearly establishing the respective rights and obligations of the Parties under the 1858 Treaty as interpreted by the Cleveland Award would be most helpful for that purpose.

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[507] See NCM, Chap. 6.

7.2.3 Nicaragua shares the position of Costa Rica as to the possibility for this Court to make a declaratory Judgment. Such a possibility has been acknowledged by the Permanent Court[508] and confirmed by the present Court[509], and "has been foreseen in Article 63 of the Statute, as well as in Article 36…"[510].

7.2.4 In view of the Costa Rican pattern of conduct consisting of trying to put into question in every circumstance the limited character of her right of navigation on the San Juan River under the 1858 Treaty of Limits, and in order to clear up any ambiguity for the future application of the Treaty, Nicaragua formally requests the Court to reaffirm in the light of the Costa Rican claims in this case, the extent of this State's rights of navigation in the San Juan de Nicaragua River.

7.2.5 The Judgment of the Court should make clear that:

- the right of Costa Rica of free navigation with articles of trade [*con objetos de commercio*] as guaranteed by Article VI of said Treaty is strictly limited to the commerce of goods and does not include tourist activities;

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[508] See PCIJ, Judgments, 25 May 1926, *Certain German Interests in Polish Upper Silesia (Merits)*, Series A, N° 7, pp. 18-19; 16 December 1927, *Interpretation of Judgments N° 7 and 8 (Factory at Chorzów)*, Series A, N° 13, pp. 20-21.

[509] See ICJ, Judgment, 2 December 1963, *Northern Cameroon*, *ICJ Reports* 1963, p. 37: see also, 20 December 1974, *Nuclear Tests*, *ICJ Reports* 1974, p. 263, para. 30, and p. 457, para. 31.

[510] PCIJ, Series A, N° 7, p. 19.

- Nicaragua is under no obligation to accept free landing on the Nicaraguan bank of the river;
- nor to allow Costa Rican official vessels to re-supply or relieve the personnel of police posts on the territory of Costa Rica;
- nor to permit riparians of the Costa Rican bank to fish in the River; and that
- her alleged obligation "to facilitate and expedite traffic … on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888" provided for in Section I of the Treaty of 9 January 1956 has no autonomous character and is a pure reminder of the obligations of both Parties provided for in these instruments; and that;
- Costa Rica is under a strict legal obligation to comply with her obligation to respect Nicaragua's sovereignty over the river.

7.2.6 Finally, In view of the above considerations, and in particular those indicated in Chapter 2 (E), Nicaragua requests the Court to Declare that:

i. Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security.

ii. Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks.

iii. Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858.

iv. Revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty.

v. Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.

RESERVATIONS

1. In these proceedings Nicaragua has limited her arguments and claims to rights and obligations based solely on the bilateral International Instruments that regulate the questions at issue between the Parties, namely and fundamentally, the 1858 Treaty of Limits and the 1888 Cleveland Award. Costa Rica also alleges to base her claims on these same bilateral Instruments, nonetheless she has included in her *Memorial* an Appendix relating to the so called "status of the San Juan River in international law" and has made claims in favour of residents of the Costa Rican bank of the San Juan River based on Customary International Law.

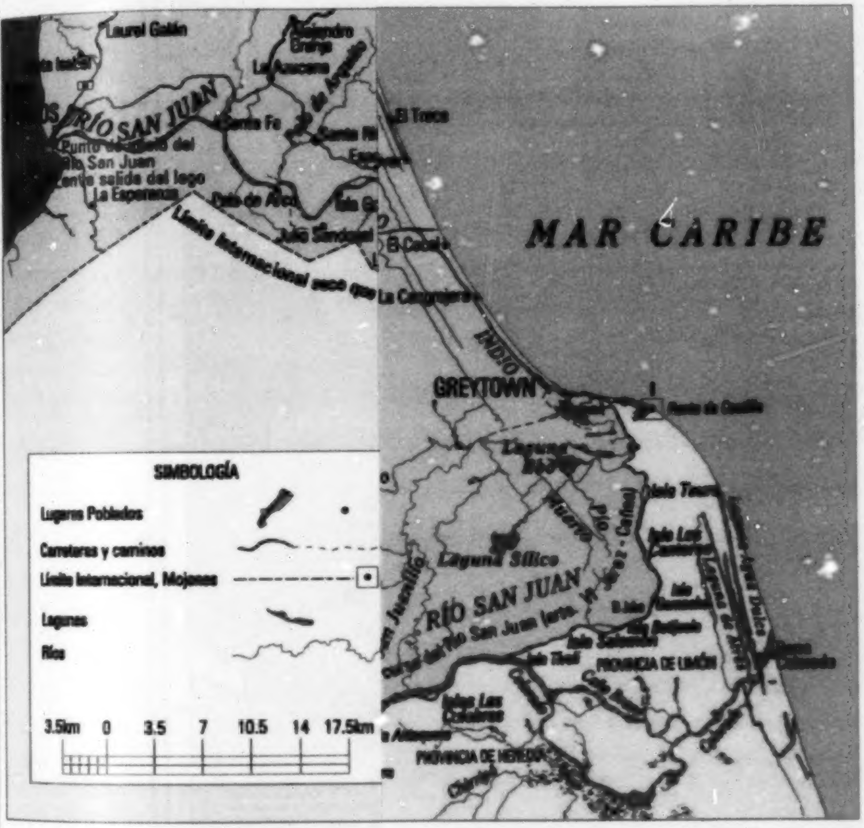
2. Therefore, if the claims of Costa Rica, and more generally, if the legal situation of the San Juan de Nicaragua River, is to be considered on legal principles that go beyond or are independent of the bilateral Instruments in force for the Parties, then Nicaragua reserves her rights to claim that the only present day outlet of the San Juan to the sea that is permanently navigable, the Colorado River, is an international waterway subject to the provisions of general international law for international watercourses not subject to a special treaty regime.

3. Furthermore, and on the basis of these same principles of international law and also on the basis of the rights and duties imposed by the bilateral instruments in force between the Parties, Nicaragua makes express reservation of her rights to bring claims against Costa Rica for the ecological damage done to the waters of the San Juan River as well as for the diversion of its traditional water flow into agricultural, industrial and other uses in Costa Rican territory and into the water flow of the Colorado River.

4. Finally, The Government of Nicaragua, further, reserves the right to supplement or to amend her Submissions as well as the arguments and evidence filed with this *Counter- Memorial*.

SKETCH MAP 1

NICARAGUA'S SOVEREI
COURSE OF THE SAN JU


Laurel Galán
La Azucena
RÍO SAN JUAN
Santa Fe
El Trece
Punto de salida del Río San Juan frente salida del lago
La Esperanza
Límite Internacional seco que
La Cangrejera
Indio
GREYTOWN
MAR CARIBE
Laguna Silico
RÍO SAN JUAN
Isla Tauro
Isla Los Camarones
PROVINCIA DE LIMÓN
PROVINCIA DE HEREDIA
SIMBOLOGÍA
Lugares Poblados
Carreteras y caminos
Límite Internacional, Mojones
Lagunas
Ríos
3.5km 0 3.5 7 10.5 14 17.5km

RESERVATIONS

1. In these proceedings Nicaragua has limited her arguments and claims to rights and obligations based solely on the bilateral International Instruments that regulate the questions at issue between the Parties, namely and fundamentally, the 1858 Treaty of Limits and the 1888 Cleveland Award. Costa Rica also alleges to base her claims on these same bilateral Instruments, nonetheless she has included in her ***Memorial*** an Appendix relating to the so called "status of the San Juan River in international law" and has made claims in favour of residents of the Costa Rican bank of the San Juan River based on Customary International Law.

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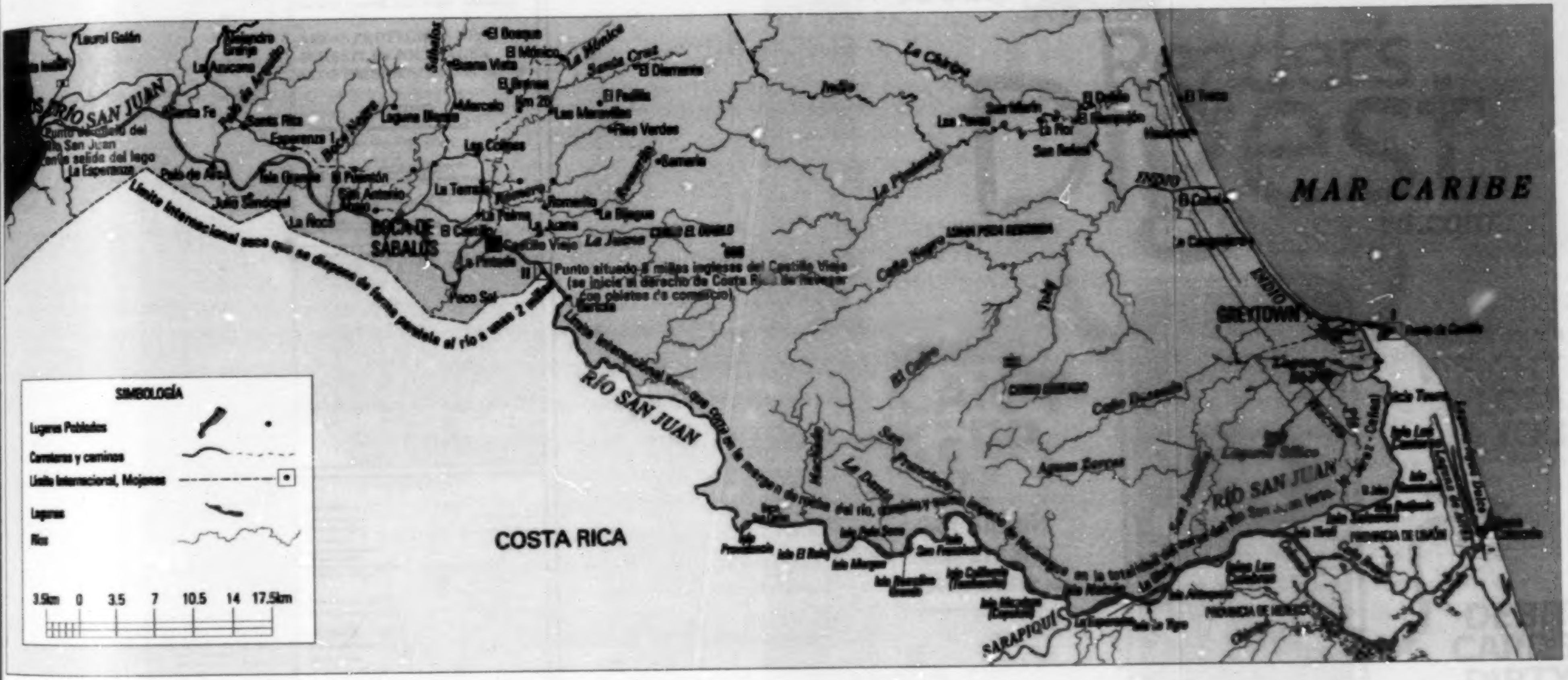
3. Furthermore, and on the basis of these same principles of international law and also on the basis of the rights and duties imposed by the bilateral instruments in force between the Parties, Nicaragua makes express reservation of her rights to bring claims against Costa Rica for the ecological damage done to the waters of the San Juan River as well as for the diversion of its traditional water flow into agricultural, industrial and other uses in Costa Rican territory and into the water flow of the Colorado River.

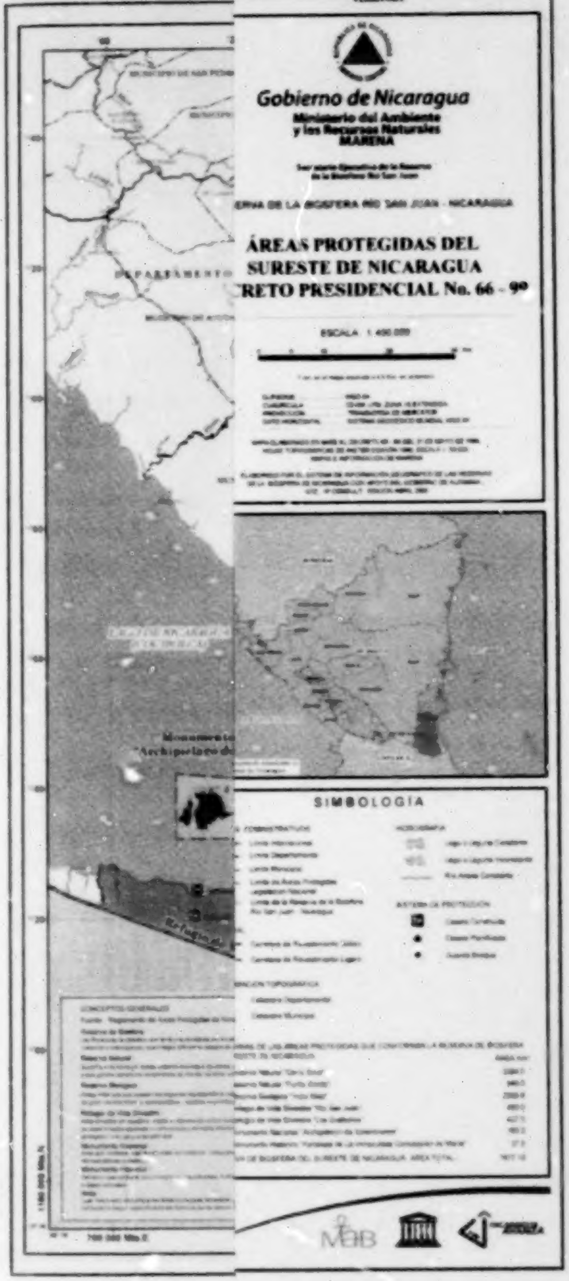
4. Finally, The Government of Nicaragua, further, reserves the right to supplement or to amend her Submissions as well as the arguments and evidence filed with this *Counter- Memorial*.

SKETCH MAP 1

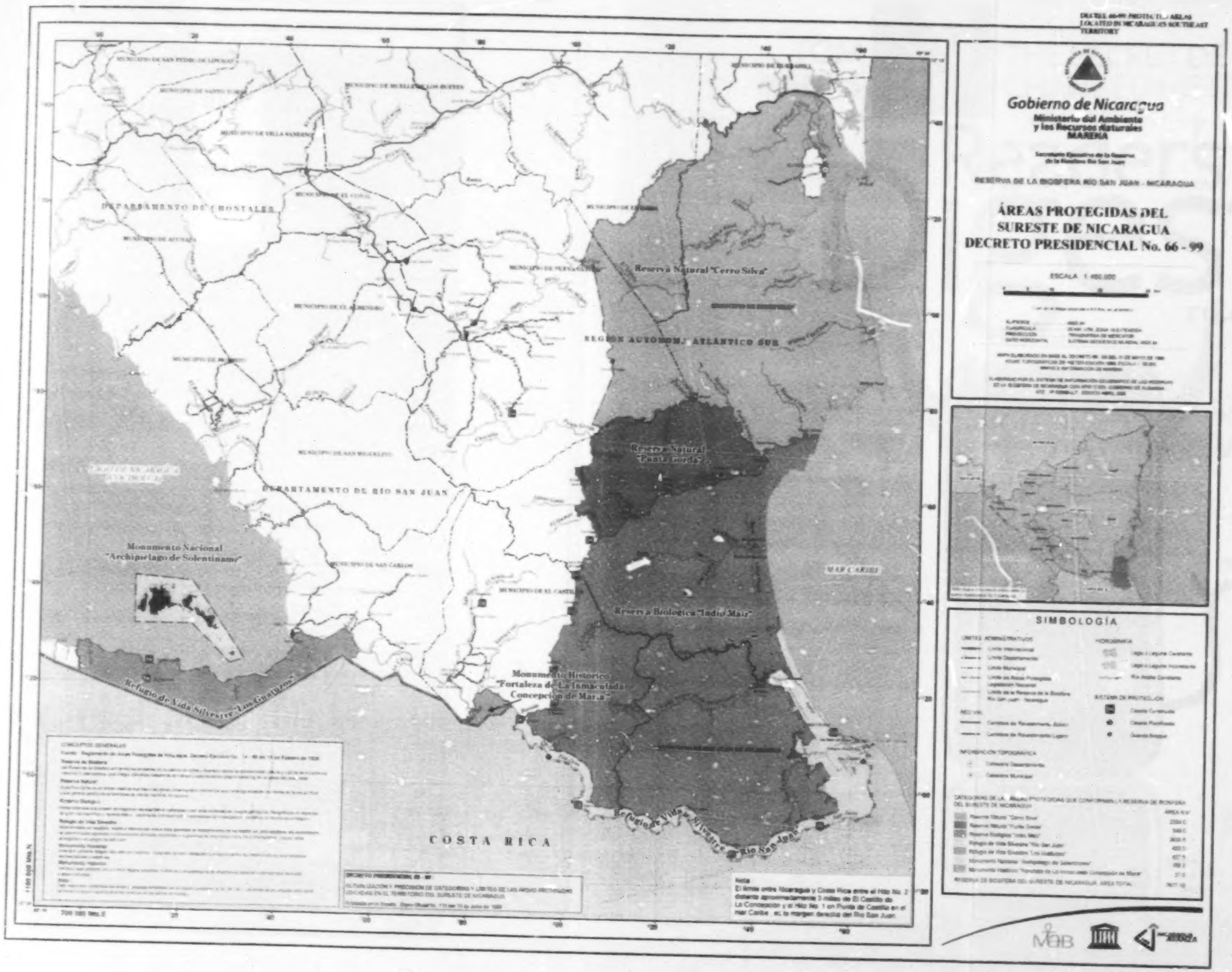
NICARAGUA'S SOVEREINGTY OVER THE WHOLE COURSE OF THE SAN JUAN DE NICARAGUA RIVER


MAR CARIBE
COSTA RICA
RÍO SAN JUAN
RÍO SAN JUAN
RÍO SAN JUAN
Laurel Galán
Alejandro Granja
La Azucena
Santa Fe
Santa Rita
Esperanza 1
Punto situado del Río San Juan en la salida del lago
La Esperanza
Palo de Arco
Isla Grande
El Pavón
San Antonio
Julio Sandoval
La Roca
BOCA DE SÁBALOS
El Castillo
Castillo Viejo
La Palma
La Juana
La Juana
Romelia
La Bijagua
Los Cortes
La Terraza
Laguna Blanca
Marcelo
Km 20
Sábalos
El Bosque
El Mónico
La Mónica
Buena Vista
Santa Cruz
El Diamante
El Padilla
Las Maravillas
Flores Verdes
Samaria
La Pintada
Poco Sol
Bartola
Límite internacional seco que se dispone de forma paralela al río a unas 2 millas
Punto situado 3 millas inglesas del Castillo Viejo (se inicia el derecho de Costa Rica de navegar con objetos de comercio)
Límite internacional seco que sigue en la margen derecha del río, quedando y siendo propiedad de Nicaragua en la totalidad del margen del Río San Juan
La Chiripa
Indio
Las Tusas
San Martín
El Ojoche
El Flor
El Recreación
San Rafael
El Toro
La Pimienta
INDIO
INDIO
El Coral
La Conquista
Caño Negro
Toro
El Carao
Caño Escondido
Agua Zarca
La Danta
San Francisco
Laguna Silico
GREYTOWN
Isla Los Pajaros
Isla Providencia
Isla El Bolo
Isla Morgan
Isla San Francisco
Isla California
Isla Machuca
Isla Nicaragua
Isla Las Gemelas
Isla Aguas Frías
SARAPIQUÍ
La Tigra
PROVINCIA DE HEREDIA
PROVINCIA DE LIMÓN
Laguna del Bolo
SIMBOLOGÍA
Lugares Poblados
Carreteras y caminos
Límite Internacional, Mojones
Lagunas
Ríos
3.5km
0
3.5
7
10.5
14
17.5km

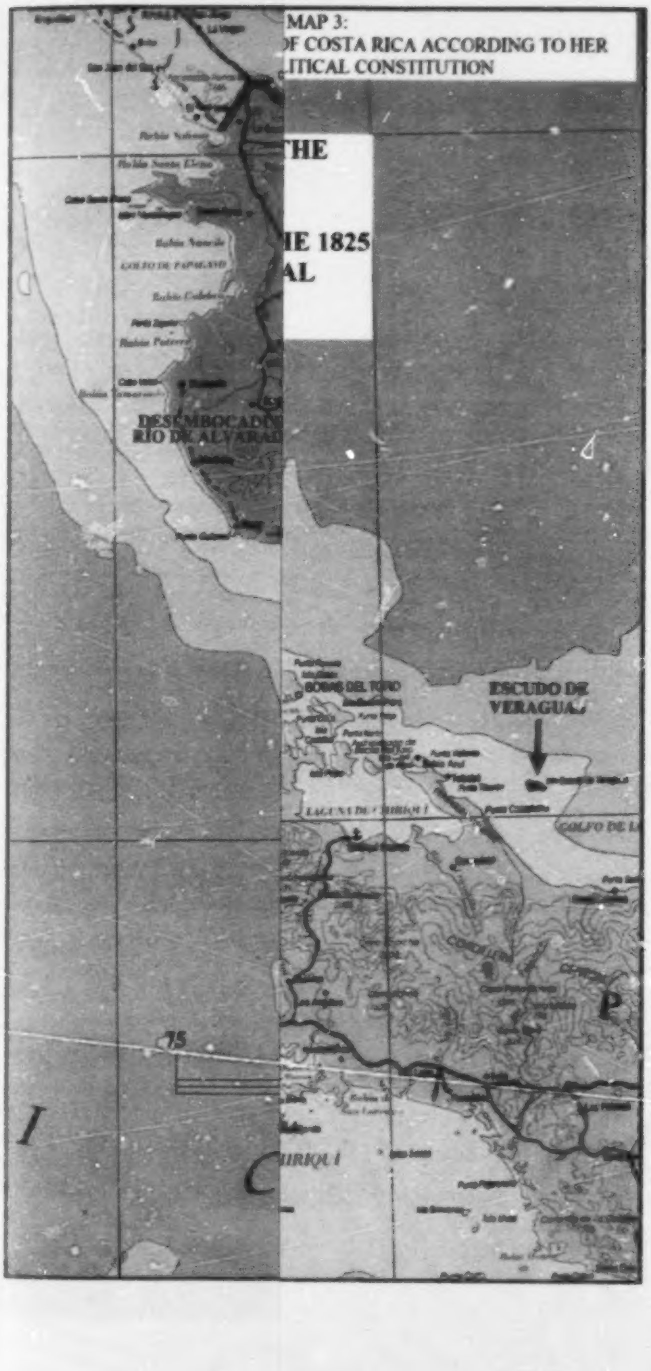
DECREE 66-99 PROTECTED AREAS LOCATED IN NICARAGUA'S SOUTHEAST TERRITORY


Gobierno de Nicaragua
Ministerio del Ambiente
y los Recursos Naturales
MARENA
ERVA DE LA BIOSFERA RIO SAN JUAN - NICARAGUA
ÁREAS PROTEGIDAS DEL
SURESTE DE NICARAGUA
CRETO PRESIDENCIAL No. 66 - 99
ESCALA 1:400,000
DEPARTAMENTO
Monumento
Archipielago de
Refugio de
SIMBOLOGIA
CONCEPTOS GENERALES
MaB

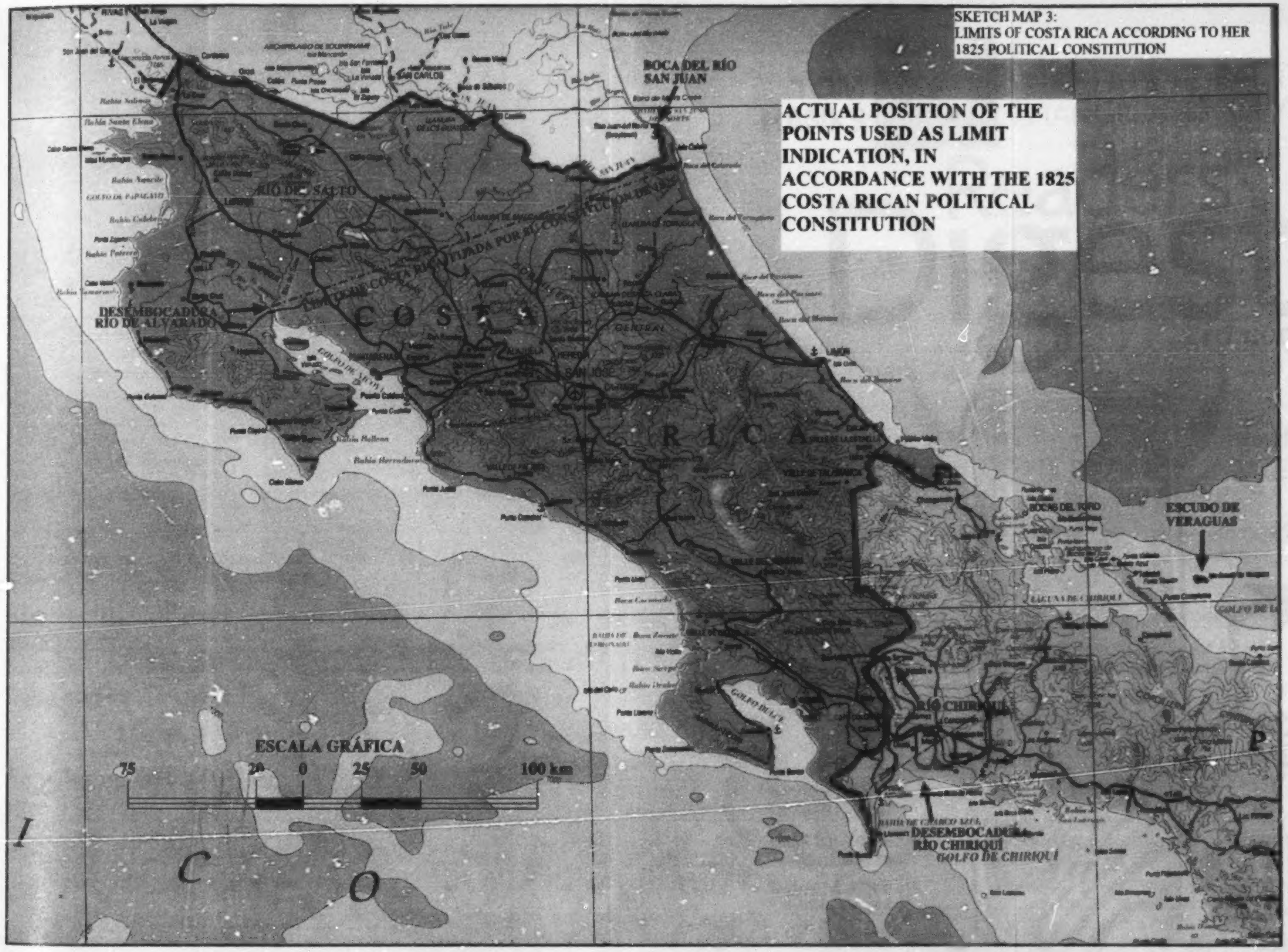
SKETCH MAP 2


DECREE 66-99: PROTECTED AREAS LOCATED IN NICARAGUA'S SOUTHEAST TERRITORY
Gobierno de Nicaragua
Ministerio del Ambiente y los Recursos Naturales
MARENA
RESERVA DE LA BIOSFERA RÍO SAN JUAN - NICARAGUA
ÁREAS PROTEGIDAS DEL SURESTE DE NICARAGUA
DECRETO PRESIDENCIAL No. 66 - 99
ESCALA 1:460,000
SIMBOLOGÍA
DEPARTAMENTO DE CHONTALES
DEPARTAMENTO DE RÍO SAN JUAN
REGIÓN AUTÓNOMA ATLÁNTICO SUR
Reserva Natural "Cerro Silva"
Reserva Natural "Punta Gorda"
Reserva Biológica "Indio Maíz"
Monumento Nacional "Archipiélago de Solentiname"
Monumento Histórico "Fortaleza de La Inmaculada Concepción de María"
Refugio de Vida Silvestre "Los Guatuzos"
Refugio de Vida Silvestre "Río San Juan"
LAGO DE NICARAGUA (COCIBOLCA)
MAR CARIBE
COSTA RICA
MUNICIPIO DE SAN CARLOS
MUNICIPIO DE EL CASTILLO
MUNICIPIO DE SAN MIGUELITO
MUNICIPIO DE EL ALMENDRO
MUNICIPIO DE NUEVA GUINEA
MUNICIPIO DE ACOYAPA
MUNICIPIO DE EL COYOL
MUNICIPIO DE VILLA SANDINO
MUNICIPIO DE SAN PEDRO DE LÓVAGO
MUNICIPIO DE MUELLE DE LOS BUEYES
MUNICIPIO DE BLUEFIELDS
Nota
El límite entre Nicaragua y Costa Rica entre el Hito No. 2 distante aproximadamente 3 millas de El Castillo de La Concepción y el Hito No. 1 en Punta de Castilla en el mar Caribe, es la margen derecha del Río San Juan.
MAB

SKETCH MAP 3

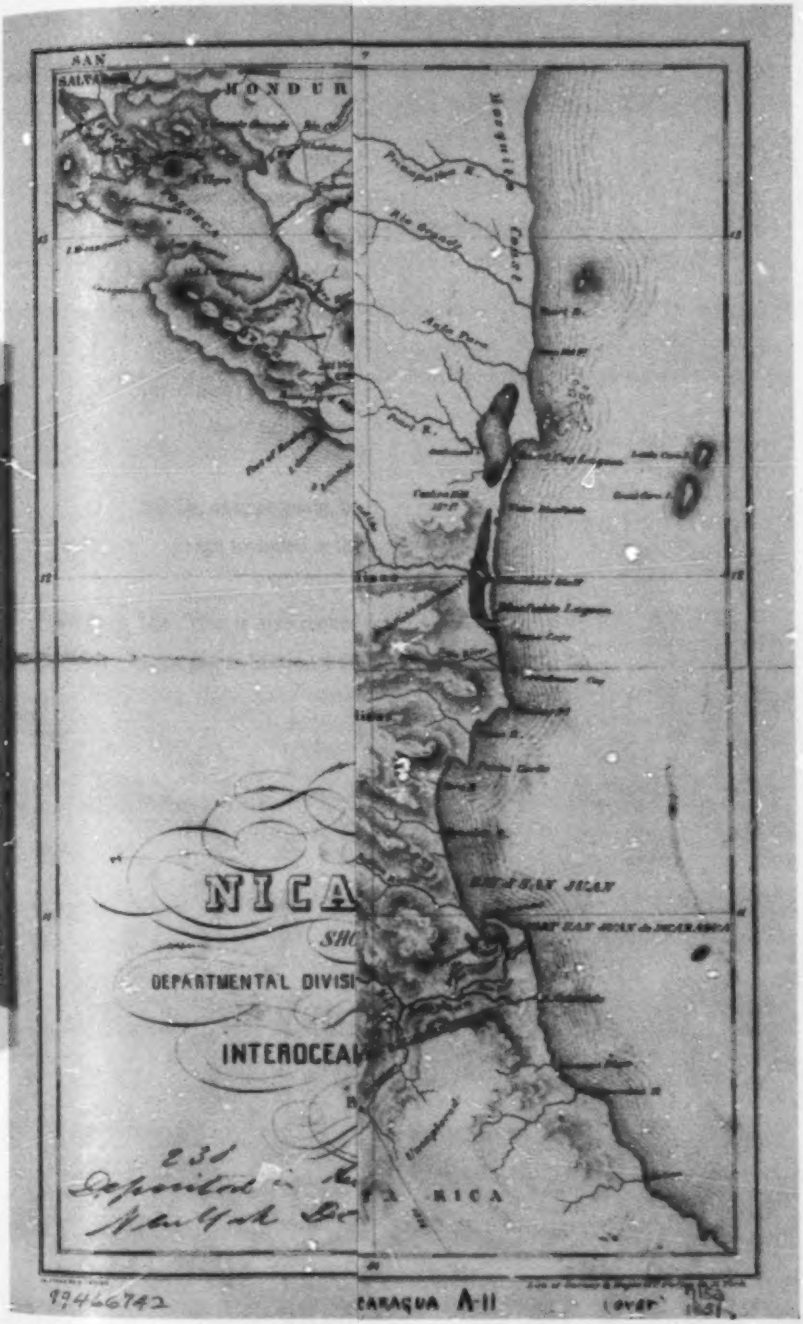

MAP 3:
F COSTA RICA ACCORDING TO HER
LITICAL CONSTITUTION
THE
IE 1825
AL
Bahia Salinas
Bahia Santa Elena
GOLFO DE PAPAGAYO
DESEMBOCADU
RIO DE ALVARAD
BOCAS DEL TORO
ESCUDO DE
VERAGUAS
LAGUNA DE CHIRIQUI
GOLFO DE LA
P
75
I
C
HIRIQUI

SKETCH MAP 3

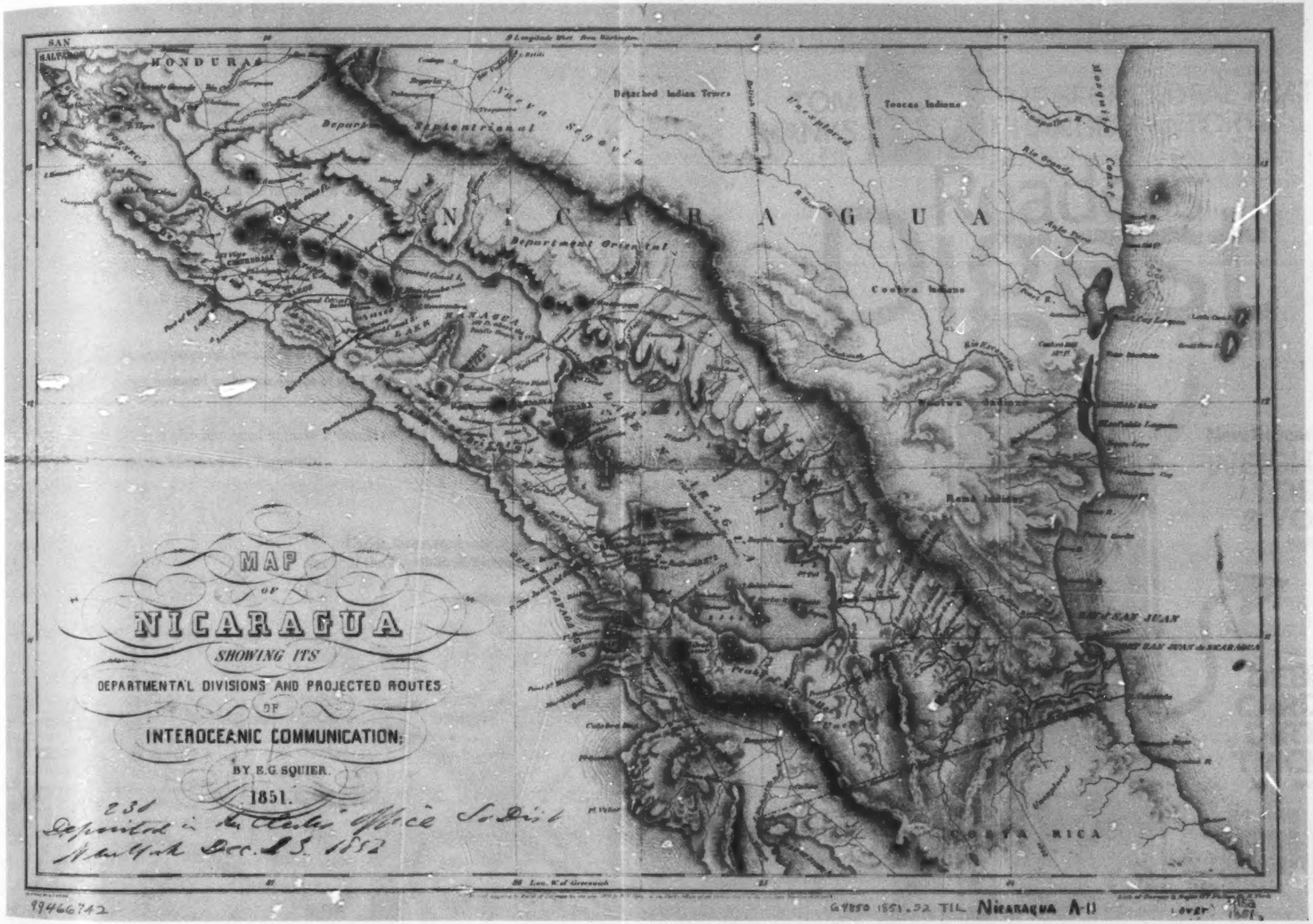

SKETCH MAP 3:
LIMITS OF COSTA RICA ACCORDING TO HER 1825 POLITICAL CONSTITUTION

ACTUAL POSITION OF THE POINTS USED AS LIMIT INDICATION, IN ACCORDANCE WITH THE 1825 COSTA RICAN POLITICAL CONSTITUTION
BOCA DEL RÍO SAN JUAN
RÍO DEL SALTO
DESEMBOCADURA RÍO DE ALVARADO
COSTA
RICA
ESCUDO DE VERAGUAS
RÍO CHIRIQUÍ
DESEMBOCADURA RÍO CHIRIQUÍ
GOLFO DE CHIRIQUÍ
ESCALA GRÁFICA
75
20
0
25
50
100 km
P
I
C
O

SKETCH MAP 4


SAN SALVA
HONDUR
Mosquito Coast
Prinzapolka R.
Rio Grande
Pearl Cay Lagoon
BAY SAN JUAN
PORT SAN JUAN de NICARAGUA
NICA
SHO
DEPARTMENTAL DIVISI
INTEROCEAN
RICA
231
Deposited in
New York
97466742
CARAGUA A-11
(over)
1851

SKETCH MAP 4


MAP
OF
NICARAGUA
SHOWING ITS
DEPARTMENTAL DIVISIONS AND PROJECTED ROUTES
OF
INTEROCEANIC COMMUNICATION;
BY E.G. SQUIER.
1851.
231
Deposited in the Clerks Office So Dist
New York Dec. 23. 1852
SAN SALVADOR
HONDURAS
NICARAGUA
Nueva Segovia
Septentrional
Department Oriental
Detached Indian Tribes
Unexplored
Toacas Indians
Cookra Indians
Woolwa Indians
Rama Indians
Mosquito Coast
Rio Grande
LAKE MANAGUA
LAKE NICARAGUA
PORT SAN JUAN
SAN JUAN de NICARAGUA
COSTA RICA
Lon. W. of Greenwich
99466742
G4850 1851 .S2 TIL Nicaragua A-11
over
1851

SUBMISSIONS

On the basis of the facts and legal considerations set forth in the Counter *Memorial*, the Court is requested:

> To adjudge and declare that the requests of Costa Rica in her *Memorial* are rejected, on the following bases:
>
> **(a)** Either because there is no breach of the provisions of the Treaty of 15 April 1858 on the facts.
>
> (b) Or, as appropiate, because the obligation breach of which is alleged is not included in the provisions of the Treaty of 15 April 1858.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section 2 of Chapter 7.

Carlos José ARGUELLO GÓMEZ
Agent of the Republic of Nicaragua

29 May 2007

DISPUTE CONCERNING
NAVIGATIONAL AND RELATED RIGHTS
(COSTA RICA v NICARAGUA)

COUNTER - MEMORIAL
OF THE REPUBLIC OF NICARAGUA

VOLUME II

29 May 2007

Annex 1

MONTEALEGRE-VELASCO TREATY. GRANADA, 16 AUGUST 1823

Assembled the gentlemen who compose it and the Envoy of Costa Rica, with the objective of concluding a treaty between the two Governments, the Commissioner proposed the following articles, as set forth in his instructions, whose competent credential is returned to him upon presentation thereof:

1. Both governments mutually recognize each other in all their branches. Approved.

2. Both governments will mutually assist each other in the event of a foreign invasion or internal disorder with up to five hundred men, considering the current forces of both Provinces, which should not be narrowly understood as if more can be provided, it shall be done. Approved.

3. If the road from Sarapiquí or San Carlos is opened to expedite communication between the Province of Costa Rica and this one, both will concur, in proportion to their powers and populations, in the expenses incurred in the garrison that will protect the commerce and security of both Provinces. Approved.

4. Costa Rica will supply to the Province of Granada tobacco for its state monopoly wholesale stores, as long as they remain a state-controlled monopoly, at twenty cents per pound in its own stores, and the Government of Granada will pay one third of the annual order at the time of shipment and the other two thirds four months after receipt thereof, all of which is to be understood upon cessation of the difficulties with the Government of Leon. Approved.

5. With respect to the debt acquired by the government of Granada with that of Costa Rica on account of two tobacco shipments. As regards the first one, valued at two thousand three hundred pesos and ten cents, it has paid one thousand five hundred, received by C. Mora, and five hundred fifty on account of the freight costs, owing only three hundred and twenty pesos and ten cents, which will be paid on this date and will be received by the Envoy and Commissioner, and as regards the second one, valued at three thousand sixty-five pesos and thirty-five cents, an order of payment will be issued against the Administrator of Masaya, D. Gregorio Bolaños, and his

guarantors, for the forty hundredweights that he received in January of this year, for which he has not rendered accounts to date, and the rest will be paid within two months. Approved.

6. The mail cost will be proportionally gauged, two thirds corresponding to the two contracting governments, with the understanding that mails will not be intercepted or otherwise its full cost will be paid. Approved.

7. As regards reciprocal commerce between both Provinces, it will be stipulated… (the rights are set forth in accordance to instructions).

8. Given that the party of Nicoya, due to its topographic location and proximity, could receive greater benefits from the government of Costa Rica, the government of Granada will inform as to its determination. Approved.

9. The ratification of the foregoing treaties is reserved by the Government of Costa Rica, as set forth in the credential of its Envoy, and a period of one and a half months is pre-established for the monthly mail to come and return, which seems opportune in this respect. Approved.

And as regards the question on whether or not this Government, which now depends on the Sovereign Constituent Assembly, has the authority to enter into treaties like the foregoing and whether or not such treaties can be ratified, it was affirmatively resolved, but always with the character of temporariness and subject to the approval of the Sovereign Assembly, which will be informed in this respect. Consequently, after rereading the foregoing context in its entirety to the contracting parties, this Governance Board and the Legatee of Costa Rica, D. Mariano Montealegre, acting in the name of his Government, solemnly commit to the foregoing agreements dependent on the aforesaid ratification, for the time being making the demonstrations that are possible and this Government undertakes to solemnly ratify this treaty in such terms that denote its rejoice, and they sign at this Sessions Hall in Granada, on the seventeenth day of the month of August in the year one thousand eight hundred and twenty-three, the first year of our freedom.

José Antonio Velasco – Mariano Montealegre – Juan Argüello – Bernabé Montiel – Venancio Fernández – Nicolás de la Rocha – Juan José Guzmán, Secretary.

Annex 2

MONTEALEGRE-SOLIS TREATY. LEON, 9 SEPTEMBER 1823

1. That he recognizes, in the name of the Province of Costa Rica, the Government of Leon as free and independent, and the latter in the same manner recognizes that of Cartago, and by virtue thereof they proceed to the other pacts that each contracting party shall religiously observe until the Constitution of the State to be established by the National Constituent Assembly of the United Provinces determines the fate of Leon and Costa Rica.

2. That the main object of these treàties being an alliance and reciprocity, there shall be sincere and perpetual peace between the two contracting Provinces and they shall fraternally assist each other as stated below. If any of the two Provinces is attacked by a foreign enemy, the Province of Leon, as long as the division with Granada continues, shall assist the Province of Costa Rica with five hundred men and with one thousand if the entire Province was concentrated; and the Province of Cartago shall assist the former with a force of five hundred men, who shall be paid according to the regulations of Spain, and if the aforementioned regulations changed in any of the Provinces, the highest salaries shall be paid.

3. Likewise, under the same terms, they shall reciprocally assist each other in the internal struggles that arise in either of the two Provinces, either to do away with the authorities that are lawfully constituted or for any other reason aimed to disturb order and peace.

4. The Government of Costa Rica shall remain neutral in any disputes between Leon and Granada and thus shall not assist one or the other, and Leon shall do the same if any disputes arise between Granada and Cartago.

5. Costa Rica undertakes to recognize in all judicial matters the Courts of Justice of this capital city in respect of second and third instances, without applying the laws of sovereign immunity.

6. As a consequence of the preceding articles, Costa Rica, on its part, is bound to concur in the income of the magistrates and their office expenses and salaries with an amount proportional to the wealth of the peoples that are subject to the recognition and protection of the aforesaid courts.

7. As regards the changes to the rights of commerce proposed by the Envoy of Costa Rica, as they entail serious difficulties that could be speedily surmounted by the Assembly, each Province shall follow, in the mean time, as it may deem convenient, the general or particular regulations, reserving the right to deal with this matter later according to the circumstances that arise in the future.

8. As regards the fortress of the San Juan River that he requests on behalf of the Government of Costa Rica, the resolution and agreement on this matter is deferred until the Constitution of the United Provinces has been established, and if it is delayed for any reason, the aforementioned fortress will be provided according to the engineering plans and both Provinces will contribute, as shall be agreed at that time, the best data and knowledge.

9. Costa Rica undertakes to provide good quality tobacco as may be requested by this Government, at twenty-five pesos per hundredweight in its stores, free of duties, and this Government undertakes to make the respective payments in three installments, to wit: the first one in cash at the time that the order is placed in the month of November, the second one in March, and the last one in August, all payable in this city of Leon.

10. Since it has not been possible to satisfy the rest of the one thousand hundredweight bales of tobacco previously contracted due to the hostilities with Granada and contrabands, it shall be delivered in the month of December of this year according to the terms set forth in this contract.

11. Considering the lack of currency until we are constituted, the money coined by Cartago will run in this Province and the money coined in this Province will also be accepted in Costa Rica, provided that the silver coined by each of the Governments is of good quality and weight, and stamped in dies, which will be understood henceforth since this Government has cast close to three thousand pesos.

12. As regards the incorporation of Nicoya to Costa Rica proposed by its Envoy, we will wait until the territory is divided by the Assembly.

13. Nothing can be done for the time being with respect to the payment of the mail on the Cartago route due to the many difficulties resulting from the situation in Granada.

14. So as not to delay the mail from the Provinces, the mail from Cartago will leave that city on the eighteenth of each month at twelve noon, and it

will leave Costa Rica on that same date, and this order will commence next November.

15. As regards the payment of ninths and consolidation, the resolution and settlement of this matter is deferred until the necessary file is prepared by a commission appointed for such important matter, which will be concluded as early as possible.

16. With respect to the great scarcity in Granada due to the disputes with this Government, Mr. Montealegre asked that this Province guarantee the debt of three thousand and something pesos that Granada has outstanding to date with Costa Rica and this Government has agreed to take responsibility for the aforementioned amount, provided that the government of Cartago does not supply tobacco to Granada until it has paid the aforesaid debt and this Government is able to persuade Granada to recognize and submit to its former capital, and the terms of this responsibility were left in suspense by Mr. Montealegre, subject to the approval of his Government, as well as all the foregoing articles, and both Provinces will be subject to the faithful observation and performance of this treaty upon ratification thereof.

Leon, 9 September, 1823.

Pedro Solís, Vocal Presidente – José Carmen Salazar – Domingo Galarza – Mariano Montealegre – Ramón Sarria – Narciso Mayorga, Vocal Secretario.

Annex 3

CHAMORRO-MAYORGA-WHITE CONVENTION. GRANADA, 14 AUGUST 1851

Decree dated 20 August 1851 ratifying the Convention entered into by the Commissioners of the Supreme Government, Colonel Fruto Chamorro and Mateo Mayorga, on the 14th day of this month with J. L. White, representative of the American company.

The President of the Senate of the Republic of Nicaragua makes known to its citizens that the Legislative Assembly has decreed the following:

The Senate and House of Representatives of the State of Nicaragua, having held an extraordinary session,

Decree:

Art. 1. The Treaty entered into by the Commissioners of the Supreme State Government Colonel Fruto Chamorro and Licentiate Mateo Mayorga on the 14th day of this month with J. L. White, representative of the American Maritime Canal Company, is hereby ratified. The Treaty reads as follows: "The Supreme Government of the Republic of Nicaragua, fully authorized by virtue of Legislative Decree of August 13th, for the sole purpose of facilitating the construction of a maritime canal, and pursuant to the wishes expressed by the canal company, has agreed, through its commissioners Messrs. Colonel Fruto Chamorro and Mateo Mayorga and Mr. J. L. White, representative of the aforementioned company, to separate and divide the section concerning the navigation of steamships on Nicaraguan waters from the contract of 22 September 1849 regarding the construction of the canal through the isthmus of Nicaragua. To this end, the following agreement has been entered into:

Art. 1. The Republic of Nicaragua authorizes the American Maritime Canal Company to divide and separate all the powers, privileges, rights and obligations described in Articles 6, 14, 20, 21, 22, 23, 30, 32, 33, 34 and others regarding navigation on Nicaraguan waters, which are not essential to the construction and use of the maritime canal, from the powers, privileges and rights granted under the treaty signed by said Government on 22 September 1849 and amended on 11 April 1850.

Art. 2. Said Company is also authorized to form another separate and distinct Company, comprised by the same members participating in the original company. This new Company will enjoy the powers and be subject to the obligations inserted in the aforementioned articles, provided that they are not contrary to the rights granted or the obligations imposed upon the Canal Company.

Art. 3. The newly created Company will proceed to execute and comply with those objectives under its competence in that part concerning the aforementioned articles, and will be entitled and enjoy the protection of the Government of Nicaragua on the same terms as those stipulated in the original contract of 22 September 1849 and its amendment on 11 April 1850, regarding the construction of the maritime canal. All those acts or objects that may infringe the rights of the canal company shall also be considered to infringe the rights of the newly created company as regards its establishment.

Art. 4. The new company will be called "Accessory Transit Company". It will comprise an incorporated and political entity with perpetual succession for the duration of its legal existence, and will have full powers to exercise its rights and privileges and to fulfill the obligations set forth in this convention, in such manner as may be deemed more convenient, and as long as its actions are not contrary to the privileges and obligations set out in the original contract of 22 September 1849 and its amendment on 11 April 1850.

Art. 5. Said company, constituted as an incorporated and political entity, may appoint and remove its employees and agents according to its best interests. It will have the right to vote and adopt provisions and regulations as it deems fit for optimal management of its interests, to ensure the enjoyment of its privileges and to fully comply with its obligations. The company may fix the amount and value of the shares to be issued, and may increase the number of shares, if necessary. It may also indicate how they may be transferred and carry out whatever is more convenient for the strict compliance of the company objective as indicated in the aforementioned articles.

Art. 6. The company constituted as an incorporated entity will appoint a board of directors, elect the president and fix the number of its members, a majority of which will determine and approve all the necessary resolutions leading to the achievement of the objective set forth in the foregoing articles and others that refer to and do not run counter to the right to build and use the canal.

The company may adopt a common seal and change it if necessary. It may sue and be sued in the State courts as though it were a moral person.

Art. 7. All properties, objects, shares, rights, credits and effects of the new Company will be free of all charges or duties for the duration of the concession, in the same terms as stipulated in the original contract of 22 September 1849 and its amendment on 11 April 1850, regarding the building of the maritime canal and other objects.

Art. 8. This convention and all the rights and privileges guaranteed and conferred to the Company will cease on the same date that the original contract expires, either due to the expiration of the term agreed therein or for any other cause or reason that invalidates or annuls said contract.

Art 9. It is hereby stipulated and agreed by the contracting parties that no provision in the present convention may be or will be interpreted as minimally altering the obligations imposed upon each of the contracting parties in the original contract of 22 September 1849 and its amendment on 11 April 1850.

Done and signed in duplicate at the city of Granada, Nicaragua, on the fourteenth day of August of eighteen hundred fifty-one. J. L. White, Counsel to the A.T. and Ship Canal Co. – Fruto Chamorro – Mateo Mayorga.

Art. 2. For the present convention to become a State law it must be ratified by the aforementioned Company within two months from this date.

Done at the Sessions Hall of the Senate on 19 August 1851. Pedro Aguirre S.P. – J. de Jesús Robleto S.V., secretary – Cornelio Gutierrez, S.S. to the Executive Branch – Hall of the Chamber of Representatives.

Granada, 19 August 1851. Francisco Barbarena, R.P. – José María Estrada, R.S. – Manuel Urbina R.S. – Therefore, execute.

Granada 20 August 1851. – José de Jesús Alfaro. To the Minister of Foreign Relations and Home Affairs, Mr. Fermín Ferrer.

Annex 4

MARCOLETA-MOLINA PRELIMINARY TREATY.
WASHINGTON, 28 JANUARY 1854

The undersigned, José de Marcoleta, Envoy and Plenipotentiary Minister of the Republic of Nicaragua, and Felipe Molina, Envoy and Plenipotentiary Minister of the Republic of Costa Rica, to the Government of the United States, fully convinced that failure to make an arrangement, albeit preliminary in nature, between their respective countries, concerning borders and inland navigation, may cause serious conflicts and infinitely transcendental evils to both countries, and deeming themselves fully authorized to this effect, have agreed on the following

PRELIMINARY CONVENTION

Article 1

The Governments of the Republics of Nicaragua and Costa Rica mutually commit themselves to putting an end as soon as possible to the differences that unfortunately have arisen and still exist between said Republics, regarding sovereignty of certain territories and certain inland navigation rights, either through a direct compromise between the two interested parties, without third-party intervention, or by submitting themselves to the decision made by a friendly Power.

Article 2

In case the currently pending negotiations in San José, between the Government of Costa Rica and the Nicaraguan Plenipotentiary, do not unfortunately have the effect intended by both parties, it is hereby provided that immediately after exchanging ratifications of this Convention, the Republics of Nicaragua and Costa Rica shall submit the decision on each and every pending issue between the two Governments, with respect to borders, inland navigation, and sovereignty of whichever disputed territories, rivers, and lakes, without any reserve, to the arbitration award of His Majesty the French Emperor, or of any other Government which any of the contracting parties deem it convenient to designate upon exchanging ratifications of this Convention.

Article 3

It is hereby equally agreed that immediately after securing consent of the chosen arbitrator, both Republics shall confer him full powers to resolve as he considers best, according to equity and justice principles, all pending issues between the aforementioned Governments, after examining reports and documents produced by each interested party, respectively, in support of their rights, through their diplomatic agents or otherwise, with the understanding that failure by one of the parties to claim its right in the non-renewable term of one year shall not be grounds for the arbitrator to suspend his decision privileging what has been informed solely by the other party.

Article 4

While the desired arrangement is taking place, the following is established: Both contracting parties commit themselves to strictly maintain the *status quo*.

Consequently, both Governments shall abstain from making any land concession, navigation privileges, or privileges of any other nature, under any concept, to Governments, individuals, or companies on the right or southern bank of the San Juan River nor on the shores of Lake Nicaragua, from the head of said river across from San Carlos fort to the South and East until a point on said Lake across the mouth of La Flor River on the Pacific; nor on any other portion of disputed land not currently occupied by either of the parties. This shall not preclude contracting parties, however, from continuing to exercise their jurisdiction the way they have been doing it so far on disputed territory sites currently occupied by one of the two parties, respectively.

Costa Rican citizens shall have the power to freely come in and out through the port of San Juan with their ships and goods and navigate, except by steamboat, on the river bearing the same name and on its tributaries flowing from the South, and on Lake Nicaragua in all directions, without being subject to any Nicaraguan taxes or levies, except when they drop anchor in coves, ports, or places currently in possession by Nicaragua or when they introduce products or goods for consumption in Nicaragua, in which case they shall be subject to the provisions of laws of the latter.

Article 5

Since the Government of Nicaragua has entered contracts with a company for the opening of the interoceanic canal and transit through the isthmus, by virtue of which it has granted said companies the exclusive privilege of steamboat navigation on the San Juan River and Lake Nicaragua, and it has transferred ownership of some land portions on both banks of the San Juan

River, provisions that come into conflict with the rights Costa Rica views as its own, it is nonetheless hereby established that Costa Rica shall not oppose Nicaragua's fulfillment of its obligations, should the projected canal works be carried out.

In turn, Nicaragua shall not hinder execution of contracts Costa Rica may have already entered concerning navigation on the Sarapiquí River.

Article 6

The contracting parties commit themselves to help each other through their good offices and by any other agreed upon or seemingly conducive means to achieve a favorable resolution of pending or eventual issues of any of the parties with foreign nations or foreign subjects or citizens, either over the disputed territory or over territories on which no dispute existed between said Republics, but on which some issue between any of the aforementioned Republics and other Governments or persons has arisen or might arise.

Article 7

It is hereby expressly agreed that nothing in this Convention shall be interpreted as a waiver, dismissal, or assignment of the rights each of the contracting parties claims from the other, as long as no definitive arrangement of theses issues has been reached, through either an *ad hoc* Treaty or through an arbitrament.

Article 8

This Convention shall be submitted by the undersigned to their respective Governments, and in case it is adopted by them and ratified by Legislatures of each contracting Republic, ratifications shall be exchanged within six months from this date or even before, if possible, in Washington, San José, or Managua.

In witness whereof, the undersigned Plenipotentiaries have signed this Convention in duplicate and have stamped it with their respective seals, in the city of Washington, on the twenty-eighth day of the month of January of the year of the Lord one thousand eight hundred and fifty four.

J. de Marcoleta F.Molina

Annex 5

CASS-IRISARRI TREATY. WASHINGTON, 16 NOVEMBER 1857

The Republic of Nicaragua and the United States of America, being desirous of maintaining mutual relations of friendship for the purpose of promoting commercial intercourse between their respective citizens and implementing a common arrangement to open a communication route between the Atlantic and Pacific Oceans through the San Juan de Nicaragua River, and either Lake Nicaragua or Managua, or any other route through the territory of the aforesaid Republic of Nicaragua, have agreed to conclude a treaty of friendship, commerce and navigation, and for such purpose have appointed the following Plenipotentiaries:

The Republic of Nicaragua, Antonio José de Irisarri, Envoy Extraordinary and Minister Plenipotentiary to the United States of America,

And the President of the United States of America, Lewis Cass, Secretary of State of the United States, who, after having exchanged their full powers, found to be in good form, have agreed upon the following articles:

Article I

There shall be perpetual amity between the United States and their citizens on the one part, and the Government of the Republic of Nicaragua and its citizens on the other part.

Article II

There shall be reciprocal freedom of commerce between all the territories of the United States and those of the Republic of Nicaragua.

The subjects and citizens of both countries, respectively, shall have liberty to come freely and securely with their ships and cargoes to all the places, ports and rivers in the aforesaid territories, to which other foreigners are or may be permitted to come, enter, remain and reside in any part thereof, respectively, as well as to hire and occupy houses and warehouses for commerce; in general, merchants and traders of each nation, respectively, shall enjoy the most complete protection and guarantee in their trade, subject always to the laws and statutes of both countries, respectively.

In like manner, the respective ships of war and trade of both countries shall have liberty, freely and securely, to come to all the ports, rivers and places to which other foreign vessels of war and merchant ships are or may be permitted to come, enter, anchor and remain there and refit, subject always to the laws and statutes of both countries respectively.

The right to enter the places, ports and rivers mentioned in this article is not understood as a privilege of coastal trade, which is only permitted to national vessels of the country where it is carried out.

Article III

It being the intention of the two High Contracting Parties to mutually bind themselves by the preceding articles to treat each other on the footing of the most favored nation, it is hereby stipulated by both that any favor, privilege or immunity which either Contracting Party has granted or may grant to the subjects or citizens of any other State shall be granted gratuitously to the subjects or citizens of the other Contracting Party if the concession in favor of that other nation shall have been gratuitous; or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

Article IV

No higher nor other duties shall be imposed on the importation into the territories of the United States, of any articles, being of the growth, produce or manufacture of Nicaragua, nor shall any other or higher duties or charges be imposed on the importation into the territories of the Republic of Nicaragua, of any articles, being of the growth, produce or manufacture of Nicaragua, than such as are or may be payable on like articles being of the growth, produce or manufacture of any other foreign country; nor new imposts or duties may be imposed in the territories of either of the High Contracting Parties on the exportation of any articles to the territories of the other.

Article V

No higher nor other duties on account of tonnage, lighting, harbor fees, pilotage or salvage in case of damage or shipwreck, or on account of any other local charges, shall be imposed in any port of Nicaragua on U.S. vessels, other than those payable in the same ports by Nicaraguan ships; nor in any of the ports of the United States on Nicaraguan ships, than those payable in the same ports by U.S. vessels.

Article VI

The same duties shall be paid on the importation into the territories of the Republic of Nicaragua, of any articles, being the growth, produce or manufacture of the United States, whether such importations shall be made in Nicaraguan or U.S. ships; and the same duties shall be paid on the importation into the territories of the United States, of any articles, being the growth, produce or manufacture of the Republic of Nicaragua, whether such importations shall be made in U.S. or Nicaraguan vessels.

The same duties shall be paid, and the same discounts and concessions shall be granted on the exportation to the Republic of Nicaragua of any articles, being the growth, produce or manufacture of the United States, whether such exportations shall be made in Nicaraguan or U.S. vessels; and the same duties shall be paid, and the same discounts and concessions shall be granted on the exportation of any articles, being the growth, produce or manufacture of the Republic of Nicaragua, to the territories of the United States, whether such exportations shall be made in U.S. or Nicaraguan vessels.

Article VII

All merchants, ship captains and other citizens of the United States shall enjoy full liberty in the territories of the Republic of Nicaragua to manage their own affairs, in accordance with the law, or to commission them to whomsoever they choose as broker, agent or interpreter; nor shall they be obliged to employ any other persons in those capacities than those employed by Nicaraguan citizens, nor to pay them any other salary or remuneration than such as is paid in like cases by Nicaraguan citizens; and absolute liberty shall be granted in all cases to the buyer or seller to contract and fix the price of any goods, wares or merchandise imported to or exported from the Republic of Nicaragua, as they shall deem appropriate, observing the laws and customs of the country.

The same privileges shall be enjoyed in the territory of the United States by Nicaraguan citizens under the same conditions.

The citizens of the High Contracting Parties shall reciprocally receive and enjoy full and perfect protection for their people and property, and shall have free and open access to the courts of justice in the said countries, respectively, for the prosecution and defense of their just rights; and they shall be at liberty to employ, in all cases, the attorneys, proxies or agents of whatever description, whom they may think proper; and they shall enjoy in this respect the same rights and privileges as native citizens.

Article VIII

In whatever relates to the police of the ports, loading and unloading of ships, security of the merchandise goods and effects, the succession to personal estates by will or otherwise, and the disposal of personal property of every sort and denomination, by sale, donation, exchange, testament, or in any other manner whatsoever, as well as the administration of justice; the citizens of the two High Contracting Parties shall reciprocally enjoy the same privileges, liberties and rights enjoyed by native citizens, subject, of course, to the local and national laws of both countries, respectively.

The foregoing provisions shall be applicable to real estate situated within the States of the American Union, or within the Republic of Nicaragua, in which foreigners shall be entitled to hold or inherit real estate.

But in case real estate situated within the territory of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, is not permitted to own said property in the State in which it is situated, said heir or other successor shall be accorded such conditions as the laws of the State will permit to sell such property and shall be at liberty, at all times, to withdraw and export the proceeds thereof without difficulty and without paying to the Government any charges other than those which would be paid by an inhabitant of the country in which the real estate is situated.

If a citizen of either of the two High Contracting Parties shall die without will or testament in the territory of the other party, the Minister or Consul or other Diplomatic Agent of the nation to which the deceased belonged (or the representatives of said Minister or Consul or other Diplomatic Agent, in his absence) shall have the right to nominate curators to take charge of the property of the deceased, so far as the laws of the country will permit, for the benefit of the lawful heirs and creditors of the deceased; giving proper notice of such nomination to the authorities of the country.

Article IX

The citizens of the United States residing in Nicaragua, and the citizens of Nicaragua residing in the United States, may intermarry with the natives of the country; hold and enjoy, by purchase, marriage, or descent, any estate, real or personal, without thereby changing their national character, subject to the laws which now exist or may be enacted in this respect.

The citizens of the United States residing in Nicaragua, and the citizens of Nicaragua residing in the United States, shall be exempted from all compulsory military service whatsoever, either by sea or by land, and from all contributions of war, military exactions, forced loans in time of war; but they shall be obliged, in the same manner as the citizens of each nation, to pay lawful taxes, municipal and other modes of imposts or ordinary charges, loans and contributions in time of peace (as the citizens of the country are liable), in just proportion to the private property they own.

Nor shall the property of any citizen, of any kind whatsoever, shall be taken for any public object without full and just compensation to be paid in advance and the citizens of each of the two High Contracting Parties shall have the unlimited right to go to any part of the territories of the other, and in all cases shall enjoy the same guarantees as the natives of the country where they reside, with the condition that they duly observe the laws and ordinances.

Article X

The two High Contracting Parties may appoint consuls to reside in any territory of the other party for the protection of trade.

But before a consul shall act as such, he shall, in the usual form, be approved and admitted by the Government to which he is sent; and either of the Contracting Parties may except from the resident of consuls such particular places as they judge fit.

The Diplomatic Agents and Consuls of Nicaragua shall enjoy in the territories of the United States whatever privileges, exceptions and immunities are or may be granted to agents of the same rank belonging to the most favored nation; and in like manner, the diplomatic agents and consuls of the United States in Nicaragua shall enjoy, according to the strictest reciprocity, whatever privileges, exemptions and immunities are or may be granted in the Republic of Nicaragua to the Diplomatic Agents and Consuls of the most favored nation.

Article XI

For the better security of commerce between the citizens of the United States and the citizens of Nicaragua, it is agreed that if at any time the friendly relations between the two High Contracting Parties were informally interrupted, the citizens of either Contracting Party who may be within the territory of the other, shall, if residing upon the coasts, be allowed 6 months, and if in the interior, a whole year, to wind up their accounts and dispose of their property; and a safe-conduct shall be given them to embark at the port which they themselves shall select. Even in the event of a rupture, all the citizens of the High Contracting Parties who are established in any territory of the other, in the exercise of any trade or other employment, shall have the privilege of remaining and of continuing such trade or employment therein, without any manner of interruption, in the full enjoyment of their liberty and property, as long as they conduct themselves peacefully and do not commit any offense against the laws; and their goods and effects, of whatever description they may be, whether in their own custody or entrusted to individuals or to the State, shall not be liable to seizure or sequestration, nor to any charges or imposts other than those which may be made upon like effects or property belonging to the native citizens of the country in which such citizens reside. In the same case, debts between private individuals, private property and shares of companies shall never be confiscated or detained.

Article XII

The citizens of the United States and the citizens of the Republic of Nicaragua, respectively, residing in the territory of the other party, shall enjoy, in their houses, persons and properties, the protection of the Government, and shall continue in possession of the guarantees which they now enjoy. They shall not be disturbed, molested or harassed in any manner on account of their religious beliefs, nor in the proper exercise of their religion, according to the system of tolerance established in the territory of the High Contracting Parties; provided they respect the religion of the nation in which they reside, as well as the Constitution, laws and customs of the country.

Liberty shall also be granted to bury the citizens of both High Contracting Parties who may die in the aforesaid territories, in burial places of their own, which in the same manner may be freely established and maintained; nor shall the funerals or sepulchers of the dead be disturbed upon any account.

Article XIII

Whenever a citizen of either of the contracting parties shall be forced to seek refuge or asylum in the rivers, bays, ports or dominions of the other with their vessels, whether merchant or war, public or private, through stress of weather, pursuit of pirates or enemies, or want of provisions or water, they shall be received and treated with humanity, and given all favor and protection for repairing their vessels, procuring provisions, and placing themselves in all respects in a condition to continue their voyage without obstacle of any kind.

Article XIV

The Republic of Nicaragua grants to the United States and its citizens and properties the right to transit from the Atlantic Ocean to the Pacific Ocean through the territory of said Republic through any route or communication, natural or artificial, either by land or by water, existing now or in the future, or to be built later under the authority of Nicaragua, which shall be used and enjoyed in the same manner and in the same terms by both Republics and their respective citizens, but the Republic of Nicaragua reserves the right of sovereignty over said route or communication.

Article XV

The United States agrees to protect all the aforesaid communication routes and to guarantee the neutrality of the same, as well as to use its influence with other nations to induce them to guarantee said neutrality and protection.

And the Republic of Nicaragua, on its part, agrees to establish two free ports at each extremity of the aforesaid communication routes on the Atlantic and Pacific Oceans. No tonnage or other duties decreed or required by the Government of Nicaragua shall be imposed in these ports to U.S. vessels or any objects or merchandise owned by U.S. citizens or subjects, or to vessels or objects of any other country with the bona fide purpose of passing through the aforementioned communication routes and not to be consumed in the Republic of Nicaragua.

The United States shall also have the freedom to carry troops and war munitions on its vessels, or by any other way, to any of the aforementioned free ports, and shall have the right to transport them through any of the aforesaid communication routes. And for the transportation or transit of persons or objects by the citizens or subjects of the United States or of other countries through the aforementioned routes of communication, no duties or tolls shall be imposed which are higher than those paid now or in the future by Nicaraguan nationals for their persons and properties. And the Republic of Nicaragua recognizes the right of the Postmaster General of the United States to enter into contracts with U.S. individuals or post transportation companies in the aforementioned communication routes or any other routes within the Isthmus, free of charges and duties by the Government of Nicaragua, and if appropriate, in closed pouches, the contents of which shall not be distributed in said Republic, but the right of said individuals and companies to carry out this transportation shall not be understood to include transportation of passengers and freight.

Article XVI

The Republic of Nicaragua agrees that, should it become necessary at any time to employ military forces for the security and protection of persons and property passing over any of the routes aforesaid, it will employ the requisite force for that purpose, but upon failure to do this from any cause whatever, the Government of the United States may, upon prior notice to the Government of Nicaragua or to its Minister in the United States, employ such force for this and for no other purpose, and when the necessity ceases, such force shall be immediately withdrawn.

Article XVII

It is understood, however, that the protection of the communication routes and the guarantee of their neutrality and security agreed by the United States shall be conditional and withdrawn if the United States considers that the persons or companies administering the routes adopt or establish traffic rules which are contrary to the spirit and intentions of this treaty, either by making unfair distinctions to benefit the trade of any nation or nations, or by decreeing excessive levies or exorbitant imposts on mail, passengers, vessels, materials, stock, merchandise and other goods.

However, the aforementioned protection and guarantee shall not be withdrawn by the United States until notice is given to the Republic of Nicaragua not less than six months in advance.

Article XVIII

It is further understood and agreed that, in any concessions granted or contracts entered into by the Government of Nicaragua in respect of the aforementioned inter-oceanic routes, or any part thereof, the rights and privileges hereby granted to the Government of the United States and its citizens shall be fully protected and excluded from the new concessions and contracts. And if said concessions and contracts already exist and are legally valid, it is also understood that the guarantee and protection of the United States, stipulated in Article 15 of this Treaty, shall be suspended and be null until the titleholders of said concessions or contracts recognize the concessions made in this treaty to the Government and citizens of the United States in respect of such inter-oceanic routes, or any part thereof, and agree to observe these concessions and to be governed by them as if they were incorporated in their entirety in their original concessions and contracts. Upon such recognition and agreement, said guarantee and protection shall enter into full force, provided that nothing in the foregoing stipulations is interpreted as affirming or denying the validity of said contracts.

Article XIX

Ten years after the completion of a railway or other communication route between the Atlantic and Pacific Oceans in the territory of Nicaragua, no company which has built the same, or has possession thereof, may divide among its shareholders, directly or indirectly, through the issue of new shares, dividends or otherwise, more than fifteen percent of the tolls collected each year, or in proportion, but when the tolls generate greater profits, this rate shall be reduced to fifteen percent per annum.

Article XX

It is understood that nothing in this treaty shall adversely affect the desires of the Government of the Republic of Costa Rica and its people to free navigation in the San Juan River of its persons and goods to the Atlantic Ocean and vice versa.

Article XXI

This treaty shall be ratified and the instruments of ratification shall be exchanged at the city of Washington within nine months or as early as possible.

In testimony thereof, the respective plenipotentiaries sign and seal this treaty.

Done at the city of Washington on this sixteenth day of November of the year of the Lord, one thousand eight hundred fifty-seven. Lewis Cass. A. J. de Yrisarri.

Annex 6

ZELAYA-VOLIO CONVENTION. SAN JOSÉ, 13 JULY 1868

The Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, being equally interested and desirous of uniting efforts to improve one of the ports in the Atlantic Ocean, either at the San Juan del Norte river or at the mouth of the Colorado river, even if one is injurious to the other, based on the assumption that either of them by itself is insufficient to satisfy the needs of commerce, and aspiring to establish the preliminary framework for such important arrangement, have conferred their full powers as follows:

The President of the Republic of Costa Rica, Julián Volio, Secretary of State at the Office of Foreign Affairs of the Republic of Costa Rica, and

The President of the Republic of Nicaragua, José María Zelaya, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua in Costa Rica.

Who, after having communicated to each other their respective full powers, which were found to be in good and proper form, have agreed upon the following:

PRELIMINARY CONVENTION

Article I

A scientific survey will be carried out in the Colorado and San Juan rivers by a commission formed by the named persons, one of which will be appointed by the Government of Costa Rica and another by the Government of Nicaragua, with the objective of determining which of the two ports would be easier to improve by combining into a single watercourse all or part of the waters of the two rivers dividing the upper San Juan.

Article II

The commission will draw up the necessary plans and budgets and will extend its report to any other points it may deem convenient so as to accomplish its important mission. The Governments of Costa Rica and Nicaragua, in the presence of these reports, will give new instructions to their respective Ministers to conclude a final agreement in this respect, if deemed appropriate.

Article III

This Convention shall be ratified by the President of the Republic of Costa Rica and by the President of the Republic of Nicaragua, and any of them may submit it to its respective legislative branch for approval, and it will enter into force immediately after the exchange of ratifications.

In witness whereof, both Plenipotentiaries sign in duplicate and affix their respective seals.

Done and dated at San José, on the thirteenth of July of one thousand eight hundred sixty-eight.

J. Volio
José María Zelaya

National Palace, San José, on the fourteenth of July of one thousand eight hundred sixty-eight.

Finding the foregoing Convention in accordance with the instructions given, it is approved, and it is submitted to the legislative Branch for ratification thereof.

Initialed by the President
of the Republic
J. Volio.

Annex 7

RIVAS-ESQUIVEL CONVENTION. SAN JOSÉ, 21 DECEMBER 1868

The Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, being desirous to conclude the preliminary Convention entered into at San José on the thirteenth of July of this year, on the improvement of one of the two ports in the Atlantic, known as "San Juan del Norte or Greytown" and "Boca del Colorado"; and having the engineers from both Republics carried out their respective explorations and surveys, and having submitted the reports regarding the case, which have seen the public light; and to resolve as may be convenient within the spirit of the referenced Convention, the Government of Costa Rica has conferred its Full Powers to Mr. Aniceto Esquivel, Secretary of State at the Office of Foreign Affairs, and the Government of the Republic of Nicaragua, Mr. Anselmo H. Rivas, Secretary of State of the same Government,

Who, after exchanging their respective Full Powers, found in good and due form, have agreed upon the following articles:

Article I

The Government of Costa Rica grants to the Government of Nicaragua the waters of the Colorado River, so that by diverting them from their present course, in whole or in part, and throwing them into the San Juan River, it may re-establish or improve the San Juan de Nicaragua port.

Article II

The Government of Nicaragua, on its part, commits to stipulate, in the event that any transit contract is entered into, whether with nationals or foreigners, that the freight rates established by Nicaragua for imported or exported products or merchandise shall also be extensive to Costa Rica, and any grace, privilege or cohesion obtained by Nicaragua, as far as transportation on the San Juan River is concerned, shall be extensive to Costa Rica on an equal footing.

Article III

Vessels from Costa Rica, which arrive at the San Juan del Norte port, shall not pay any duties which are not charged to the national vessels of Nicaragua.

Article IV

In the event that San Juan ceases to be a free port, and the Government of Nicaragua subjects to registration or taxation the merchandise which is imported or the products which are exported through it, the merchandise and products imported or exported by Costa Rica shall be exempt from such formalities and from the payment of any duties.

Article V

If the Government of Nicaragua, as a result of any internal disorder or because it finds itself at war, cannot efficiently protect the San Juan port, the Government of Costa Rica shall have the right to send the necessary force to the aforesaid port to protect the commercial interests of Costa Rica, and the Government of Nicaragua shall not concur in the cost of this provision.

Article VI

The Government of Nicaragua hereby ratifies the Treaties of Limits which have been entered into with the Government of Costa Rica; and both parties submit to the arbitration of the United States of America for the settlement of any question which may arise, either regarding those treaties or the execution of this Convention.

Article VII

This Convention shall be approved by the President of the Republic of Costa Rica and by the President of the Republic of Nicaragua, and shall also be submitted to their respective Legislative Branch for ratification, and it shall enter into force immediately after it has been ratified.

In witness whereof, both Plenipotentiaries sign in duplicate and affix their respective seals.

[Signed] A. Esquivel [Signed] A.H. Rivas

National Palace. San José, twenty-first of December of one thousand eight hundred and sixty-eight.

Finding that the foregoing Convention concurs with the conferred instructions, it is approved, and to this end, it shall be duly submitted to the Legislative Branch for ratification.

Countersigned by the
President of the Republic
Esquivel.

Annex 8

MONTEALEGRE-JIMÉNEZ INTEROCEANIC CANALIZATION TREATY. SAN JOSÉ, 18 JUNE 1869

The Republics of Costa Rica and Nicaragua, desirous of enforcing the contract entered into in Paris on the sixth of October of the year eighteen sixty-eight, between Messrs. Tomás Ayón, representative of the Republic of Nicaragua, and Miguel Chevalier, a French subject, for the excavation of an interoceanic canal, have agreed to enter into an Agreement for the purpose of determining the rights and duties of Costa Rica in return for its adhesion to the aforesaid contract.

To this end, the two Republics have appointed their respective Plenipotentiaries, to wit:

His Excellency, the President of the Republic of Costa Rica: Agapito Jiménez, Secretary of State at the Ministry of Foreign Affairs, and

His Excellency, the President of the Republic of Nicaragua: Mariano Montealegre, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua in the Republic of Costa Rica

Who, after exchanging their full powers, found to be in good and due form, have agreed on the following provisions:

Article 1

The Republic of Costa Rica adheres to the contract entered into in Paris on the sixth day of October of the year eighteen sixty-eight, between Messrs. Tomás Ayón, representative of the Republic of Nicaragua, and Miguel Chevalier, a French subject, for the excavation of an interoceanic canal, in which Costa Rica guarantees the concessionaire over its territory and in all matters concerning her, the same advantages that Nicaragua grants [Costa Rica], and which are stipulated in the following articles:

Article 2

The duration of the concession will be ninety-nine years, commencing on the date on which the canal is opened.

Article 3

The concessionaire shall choose the route which, according to the studies undertaken by experts on the matter, is considered the most suitable, but it is declared as of this moment that the canal must come up the San Juan River to Lake Nicaragua, cross the lake and end at the Pacific Ocean, [somewhere] between the extremes of Salinas and El Realejo.

(...)

Article 12

It is understood that this concession, much as the concession referred to in article 10, is applicable only to land belonging to the State, and that the State at all times maintains its sovereign rights. Further, the State also reserves itself those sites or land it deems necessary for the opening of roads.

The Republic of Costa Rica may open such roads even in Nicaraguan territory and navigate on the rivers in that territory, for the purpose of transporting and introducing its agricultural, industrial and commercial products to the canal. Nicaragua may not impede in any way whatsoever the opening of said roads, nor the navigation of said rivers; and in the mouths of these rivers, Costa Rica may establish customs and warehouses at the expense of the State, upon prior notice to the Government of Nicaragua; in no case, however, may Costa Rica place armed forces there, but only the employees necessary for the custody and security of the country's customs and warehouses, and vice versa. For its part, the Republic of Nicaragua may open roads in Costa Rican territory and navigate its rivers for purposes of commerce. Costa Rica may in no case impede the opening of said roads, or the navigation of said rivers. Nicaragua may establish customs and warehouses at their outlets, at State expense, having advised the Government of Costa Rica to that effect. In no case may Nicaragua station armed forces there, except the number of employees considered necessary for the custody and security of its customs and warehouses.

(...)

Article 43

Costa Rica undertakes, upon receiving the respective indication from Nicaragua, and in accordance with its contents, to take the necessary steps in order to obtain from the Governments of France, England and the United States of America the guarantee of neutrality and acceptance of other attributions to which reference is made in Articles 30, 46, 47, 48 and 50 of the contract above mentioned.

Article 44

The Government of Nicaragua shall be obliged to present for acceptance by the concessionaire the adhesion of Costa Rica, in accordance with the terms and conditions set out in the present Convention.

Article 45

The present Convention shall be duly ratified, and ratifications shall be exchanged as soon as possible, either in San José, capital of the Republic of Costa Rica, or in Managua, capital of the Republic of Nicaragua.

In witness whereof, the Plenipotentiaries have entered into the present Convention by signing a duplicate copy of the original and affixing their seal at San José, capital of the Republic of Costa Rica, on the eighteenth day of June of the year eighteen sixty-nine.

(Signed) A. Jiménez

(Signed) Marno. Montealegre

Annex 9

ALVAREZ-ZAMBRANA TREATY OF LIMITS.
GRANADA, 5 FEBRUARY 1883

The Republic of Nicaragua and the Republic of Costa Rica, being desirous of putting an end to the differences that have arisen between them for a long time with respect to the dividing line that should separate them, and of affirming the friendship that unites them, making their fraternal relations more efficient and fruitful, have resolved to conclude a Treaty aimed at achieving these important and common purposes.

To this end, His Excellency Mr. Joaquín Zavala, President of the Republic of Nicaragua, has appointed Dr. Francisco Alvarez as Minister Plenipotentiary, and His Excellency Mr. Próspero Fernández, President of the Republic of Costa Rica, has appointed Dr. Antonio Zambrana as Envoy Extraordinary and Minister Plenipotentiary.

The Plenipotentiaries, after communicating to each other their respective powers, found in good and due form, have agreed upon the following articles:

Article 1

The dividing line between the Republics of Costa Rica and Nicaragua begins on the right bank of the Colorado River, at its mouth on the Atlantic, and continues along that right bank up to the intersection of this river with the San Juan River, extending along the right bank of the San Juan River to a point three English miles below the exterior fortifications of the Old Castle. From here, a curve shall be drawn, taking El Castillo as the center, keeping a distance of three English miles along its entire length, up to a point two miles from the bank of the river at the distance of two miles upstream from the bank of the river on the other side of the castle. From here, the line shall continue in direction to the Sapoá river, which empties into the Lake of Nicaragua, and it shall follow its course, keeping always at the distance of two miles from the right bank of the San Juan River up to its origin in lake; and from there, up to the junction of the aforesaid Sapoá River; from a place parallel to the junction of the Sapoá River, two miles distant, it follows an astronomic straight line to the central point of the Salinas Bay, in the Southern Sea, where the dividing line ends.

Article 2

To carry out the necessary measurements, trace the line described in the foregoing article and mark it conveniently, the Governments of both Republics shall appoint, within a period not to exceed six months, following the ratification of the present Treaty, the respective Commissions in the manner they shall agree for this purpose.

Article 3

Costa Ricans shall have a perpetual right of free navigation, for interior trade, in the waters of the San Juan and Colorado Rivers, under the same terms and subject to the same laws as Nicaraguans; corresponding to Nicaragua the eminent dominion and sovereignty over the aforesaid rivers [San Juan y Colorado and lake]. Further, they shall have free use of the Bay and port of San Juan of Norte, under the same terms and subject to the same restrictions as Nicaraguans. Nicaraguans shall have the same right of navigation, for the same purposes, and subject to the same rules, on the Sarapiquí, San Carlos and Frío Rivers, in that portion where these rivers cross Costa Rican territory, and this Republic shall have eminent domain and sovereignty, in full force, over the aforementioned rivers. In recognition to the respective sovereignty of both Nations, the vessels of the one entering into the waters of the other shall hoist, in addition to its own flag, the flag of the other in the respective place.

Article 4

Costa Rica shall have the right to open in the territory of Nicaragua the necessary roads for importing and exporting its goods, through Lake Nicaragua and the Colorado River, the river and port of San Juan del Norte and, consequently, shall always occupy the surface of all the land comprised by said roads.

Nothing shall be paid by Costa Rica for exercising the right consigned in this article in her favor, provided that it uses wastelands for that purpose, but if it should need any private property, it shall proceed with the consent of the respective owners.

Article 5

Salinas Bay, in the Southern Sea, shall be common to one and the other Republic and, consequently, its advantages and the obligation to concur to its defense shall also be common. And the Republic of Costa Rica shall also concur to the defense of the Bay of San Juan del Norte, if necessary, when the Republic of Nicaragua shall so request.

Article 6

Under no circumstances, even if the Republics of Costa Rica and Nicaragua should unhappily find themselves in a state of war, neither of them shall be allowed to commit any act of hostility against the other, neither in the port and bay of San Juan del Norte, nor in the San Juan and Colorado Rivers, or in the territory between those rivers and Lake, and the dividing line, nor in the San Carlos, Sarapiquí and Frio Rivers, or in the Salinas Bay, hereby declaring that the violation of this rule shall be considered a breach of trust.

Article 7

Costa Ricans in Nicaragua and Nicaraguans in Costa Rica shall have the right to exploit the territories of both Republics, and especially that which is comprised between the San Juan and Colorado Rivers, and those on the banks of the Colorado River and Lake Nicaragua. without other restrictions than those set out by law for the natives of one and the other Republic, respectively.

Article 8

Nicaragua may divert the course of the waters of the Colorado River, directing them to the San Juan River, in which case, once this river has been equipped, its right bank up to a distance of three miles below Castillo Viejo shall be the first part of the dividing line.

Article 9

In case the Inter-oceanic Canal is built, it shall be, in all its extension from sea to sea, the true boundary between Costa Rica and Nicaragua, as long as it does not divert more than six geographical miles from the affixed dividing line. This shall not hinder the domain over the Canal that exclusively belongs to the Republic whose territory it crosses; and both agree, however, that the one that executes the project shall obtain for the natives of the other, the same advantages enjoyed by its own natives in the use and navigation of the Canal and freight and passenger rates.

Article 10

Costa Ricans in Nicaragua and Nicaraguans in Costa Rica shall be considered nationals for the purpose of obtaining and exercising citizenship rights, without losing, by reason of the enjoyment of these advantages, their nationality of origin. And they shall also be free to practice any industry or profession, without other restrictions than those set out by law with respect to natives.

Article 11

The titles, publications and other literary and professional documents, issued in any of the contracting parties, shall be admitted and recognized in the other, upon formally presenting them, duly authenticated, before the authority or entity in charge of endorsing them. Studies at scientific institutes of both Republics shall also be admitted, with the objective of gaining time and obtaining degrees and literary or professional titles, by certifying them with trustworthy documents before the respective entity.

Article 12

Commerce between both Republics shall be similar in each one of them to domestic commerce, and shall be considered as if carried out from one port to another or from one internal location to another in the same country.

This article shall only be applicable for national products.

Article 13

Both Republics undertake to conclude an extradition treaty, procure a uniform law code and adopt a common decimal system of weights, measures and currency, all in the shortest time possible.

Article 14

Whenever there is an opportunity to reach an agreement for the Central American Union, Costa Rica and Nicaragua shall jointly endeavor to achieve this great initiative. Any of the two that makes attempts in this respect, or is invited to participate, shall provide immediate and complete notice to the other of the negotiations that take place, as soon as they begin and to the extent that they occur.

Article 15

Neither of the two Republics may enter into any offensive or defensive alliances, which are detrimental or injurious for the other, and in the event that one of them is attacked by another power, the other shall be obliged, if unwilling or unable to provide assistance to the offended, to observe the strictest neutrality in relation thereto.

As regards any differences that may arise between both contracting parties, all of them, regardless of their origin or nature, shall be settled by arbitration.

Article 16

The present Treaty shall be duly ratified and the instruments of ratification shall be exchanged at the capital city of Nicaragua within three months or earlier if possible.

In witness whereof, the Plenipotentiaries sign the present Treaty in duplicate at the city of Granada on the fifth of February of one thousand eight hundred and eighty-three.

A. Zambrana

F.Alvarez

Annex 10

NAVAS-CASTRO TREATY OF LIMITS. SAN JOSÉ, 19 JANUARY 1884

The Republics of Nicaragua and Costa Rica, encouraged by the desire to put an end, on the basis of equity and brotherhood, to the differences that exist in relation to their boundary line, have resolved to enter into a Treaty. To this end, the President of the Republic of Nicaragua has designated Don Vicente Navas, Envoy Extraordinary and Minister Plenipotentiary, and the President of the Republic of Costa Rica, Doctor José María Castro, Minister of Foreign Affairs, who, after having communicated to each other their respective full powers, found in due form, have agreed upon and concluded the following articles:

Article I

The boundary line between the Republics of Nicaragua and Costa Rica is the right bank of the Colorado River, from its mouth in the Atlantic Ocean until it separates from the San Juan River, thence it follows the right bank of that River to a point at a distance of three English miles from the exterior fortifications of the Castillo Viejo; thence it runs along the circumference of a circle with a radius of three English miles from the exterior fortifications, and ends on the same right bank of the San Juan River; thence from this same bank up to a distance of three English miles from a point on the bank in front of the San Carlos fort; thence it runs along the circumference of another circle, with a radius of three English miles and at the center the aforesaid boundary point on the same bank in front of the San Carlos fort; from there to the mouth of the Frío River, in the Lake of Nicaragua, following the bank of this river to the mouth of the Sapoá River; and from this point an astronomic straight line extending to the center of Salinas Bay, demarcated by the intersection of its largest and smallest axis.

Article II

However, until the inter-oceanic canal of Nicaragua is opened to international traffic, Costa Rica shall not take possession of an area of land extending from the mouth of the Frío River to the mouth of the Sapoá River, and two English miles in width, measured from the shore of the Lake.

Article III

The restriction set forth in the foregoing article shall cease if the Government of Costa Rica builds a railroad line, at its own expense or by entering into a contract with any company, connected to the railroad line at the port of Limón, and extending to the shore of the Lake, to the bank of the Frío river or to the bank of the San Juan river.

Article IV

In the event of the construction of the railroad line indicated in the foregoing article, the Government of Nicaragua reserves the right to set up a custom-house, with its respective employees and offices, at the starting point of the railroad line, either on the bank of the Lake or at any of the aforementioned rivers, with the objective of registering any merchandise which is imported to or exported from Nicaragua through the railroad line and the port of Limón. To this end, the contracting parties agree that Costa Rica shall not charge custom duties or other national or local taxes for in-transit merchandise in its territory, and Nicaraguan nationals shall enjoy the same privileges and franchises granted to or obtained by Costa Rican nationals in relation to the use of the said railroad line.

Article V

Nicaragua shall execute, on the right bank of the San Juan River and on the right bank of the Colorado River, hydraulic works and of any other nature which it considers convenient to improve navigation thereon. If the course of the waters of the Colorado river is deviated to the San Juan River, the right bank of the river to a distance of three English miles below the Castillo Viejo, shall be the starting point of the boundary line instead of the right bank of the Colorado River stipulated in Article I.

Article VI

In the zone described in Article II, as well as on the right bank of the San Juan River, comprised between the Castillo Viejo and the San Carlos fort, the tracts of land, franchises and privileges granted by Nicaragua in a contract entered into with Mr. A. G. Menocal on 24 April 1880 are reserved for the Canal Company, and the same reservation shall be maintained in favor of Nicaragua if the aforesaid contract expires and another is entered into for the same purpose.

Article VII

In general, the rights acquired by Costa Rica by virtue of this Treaty do not restrict in any way the freedom of Nicaragua to enter into new contracts for the purpose of building the Isthmus canal if the contract with Mr. Menocal expires, but Nicaragua agrees to insure Costa Rican nationals the same privileges and franchises obtained for Nicaraguan nationals in said contracts.

Article VIII

For the purpose of performing the necessary measurements, fixing the boundary line and demarcating it with posts, the Governments of both Republics shall appoint, within six months after the ratification of this Treaty, the respective commissions in the manner they may establish by mutual agreement.

Article IX

Costa Rica shall have the right to build, within the territory of Nicaragua, the roads which are necessary to import and export its goods through the Lake of Nicaragua, the Colorado River, and the river and port of San Juan del Norte, and therefore, shall always occupy the surface of all the land comprised within the said roads.

Nothing shall be paid by Costa Rica for exercising the right prescribed in this article, provided that it uses wastelands for that purpose, but if it requires any private property, it shall proceed, with the consent of its owners, or shall request an expropriation in conformity with the laws of Nicaragua.

Article X

The Salinas Bay in the Southern Sea is common to each of the Republics and, therefore, the advantages and the obligation to concur to its defense are also common. And the Republic of Costa Rica shall also concur to the defense of the Bay of San Juan del Norte if required by Nicaragua.

Article XI

Costa Rican nationals have the perpetual right of free navigation in the waters of the Lake and of the San Juan and Colorado rivers for internal and foreign commerce, subject to the same terms and laws as Nicaraguan nationals, and Nicaragua shall have eminent dominion and the highest sovereignty over said rivers and Lake. Further, they shall have the right to freely use the bay and port of San Juan del Norte, subject to the same terms and restrictions as Nicaraguan nationals. For the same purposes and subject to the same rules, Nicaraguan nationals shall have the same right to navigate the Sarapiquí, San Carlos and Frio rivers, in that part where the rivers cross the territory of Costa Rica, which shall have eminent domain and the highest sovereignty over the aforementioned rivers. In recognition to the respective sovereignty of both Nations, the vessels of one nation entering the waters of the other shall hoist, in addition to its own flag, the flag of the other in the respective place.

Article XII

Costa Rican nationals in Nicaragua and Nicaraguan nationals in Costa Rica shall have the right to exploit the territories of both Republics, especially the territory comprised within the San Juan and Colorado rivers, as well as the land along the banks of the Colorado River and the Lake of Nicaragua, without any restrictions other than those prescribed by law for the citizens of each of the Republics, respectively.

Article XIII

For no reason whatsoever, not even if the Republics of Nicaragua and Costa Rica unhappily find themselves in a situation of war, no act of hostility between them shall ever be permitted in the port and bay of San Juan del Norte, or in the San Juan and Colorado rivers, or in the territory between those rivers and the Lake and the border line, or in the San Carlos, Sarapiquí and Frío rivers, or in the Bay of Salinas, and it is hereby declared that the violation of this rule shall be considered a breach of trust.

Article XIV

This Agreement shall be ratified and exchanged within fifteen months from this date. The exchange shall take place at this capital city or at the capital city of Nicaragua, upon due notice from both Governments.

In testimony thereof, the Plenipotentiaries sign this Treaty in duplicate and affix their respective seals, at the city of San José, Costa Rica, on the nineteenth of January of one thousand eight hundred and eighty-four.

(L. S.) Vte. Navas.

(L. S.) José Mª Castro

After reviewing the foregoing Treaty, the Government approves it.

Managua, May 14, 1884.

Cárdenas
Minister for Foreign Affairs,
Castellón

Annex 11

ROMAN-ESQUIVEL-CRUZ. GUATEMALA, 24 DECEMBER 1886

[Ratifications exchanged at Managua, June 1, 1887.]

(Traslation)

The Governments of the Republics of Nicaragua and Costa Rica desiring to terminate the question pending since 1871, viz., whether the Treaty signed by both on the 15th April, 1858, is or is not valid, have named respectively as Plenipotentiaries: Señor Don Antonio Roman, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the Government of Guatemala; and Señor Don Ascencion Esquivel, Envoy Extraordinary and Minister Plenipotentiary of Costa Rica to the same Government; who, having communicated their full powers, found in due form, and in conference with the Minister for Foreign Affairs of the Republic of Guatemala, Señor Don Fernando Cruz, designated to act as intervener and to interpose the good offices of his Government offered to the contending parties, and by them accepted, had agreed to the following Articles:--

ART. I. The question pending between the contracting Governments in regard to the validity of the Treaty of Limits of the 15th April, 1858, shall be submitted to arbitration.

II. The arbitrator of that question shall be the President of the United States of America. Within 60 days following the exchange of ratifications of the present Convention the Contracting Governments shall solicit of the appointed arbitrator his acceptance of the charge.

III. In the unexpected event that the President of the United States shall not be pleased to accept the Parties shall name as Arbitrator the President of the Republic of Chile, whose acceptance shall be solicited by the Contracting Governments within 90 days from the date upon which the President of the United States may give notice to both Governments, or to their Representatives in Washington, of his refusal.

IV. If, unfortunately, the President of Chile should also refuse, the Governments shall come to an agreement for the purpose of electing two other Arbitrators within 90 days, counting from the day upon which the President of Chile may give notice to both Governments, or to their Representatives in Santiago, of his refusal.

V. The arbitration shall be conducted in this manner:

Within 90 days of the notification to the Parties of the acceptance of the arbitration, the allegations and documents shall be produced.

The Arbitrator shall communicate the counter-allegations to the Representative of each Government within eight days of their being presented, in order that they may be answered within the 30 days following.

The Arbitrator shall give his decision, in order that it be valid, within six months from the date that the time expires for the presentation of answer to allegations, whether these be presented or not.

The Arbitrator may delegate his duties, provided this does not interfere directly with the giving of his decision.

VI. If the decision of the Arbitration declares the validity of the Treaty, the same award shall declare whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats. Also the decisions aforesaid shall, in case of the validity of the said Convention, decide the other points of doubtful interpretation found by either of the Parties in the Treaty, and communicated to the other Party within 30 days form the exchange of the ratifications of this Convention.

VII. Whatever the decision of the Arbitration be, it shall be held to be obligatory between the Contracting Parties. No other recourse shall be admitted, and it shall into force 30 days after it has been communicated to both Governments or to their Representative.

VIII. If the Treaty is declared invalid both Governments shall, within one year form the date for the receipt of the notification, come to an understanding on the demarcation of the boundary-line of their respective territories. If this understanding is not possible they shall conclude in the following year a Convention to submit the question of limits of both Republics to the decision of a friendly Government.

From the time the Treaty is declared invalid, and whilst there is not agreement between the Parties of there is not decision fixing the rights of both countries, those established by the Treaty of 15th April, 1858, shall be respected.

IX. Pending the decision on the validity of the Treaty, the Government of Costa Rica consents to suspend the fulfilment of its Agreement of the 16th March last relative to the navigation of the River San Juan by a Government steamer.

X. In case the Arbitration decides that the Treaty of Limits is valid, the Contracting Governments shall, within the 90 days following the notification of this decision, name four Commissioners, two each, who shall take the proper measures with reference to the line of the demarcation set forth in Article II of the said Treaty of the 15th April, 1858.

These measures and the demarcation to which they refer, shall be done within 30 months form the date of the naming of the Commissioners.

These Commissioners shall be allowed to depart form the line laid down in the Treaty one mile in order to lay down natural lines or lines more distinguishable, but this deviation shall only be allowed when all the Commissioners are of one accord as to the point or points to be substituted.

XI. This Treaty shall be submitted for the approbation of the Executive and Congress in both the Contracting Republics, and the ratifications shall be exchanged in Managua or San Jose de Costa Rica the 30th June next, or earlier if possible.

In witness whereof the Plenipotentiaries and Minister of Foreign Affairs of Guatemala have signed and sealed the same in Guatemala, the 24th day of December, 1886.

(L.S.) J. ANTONIO ROMAN

(L.S.) ASCENCION ESQUIVEL

(L.S.) FERNANDO CRUZ

Annex 12

GUERRA-CASTRO TREATY OF LIMITS. MANAGUA, 23 DECEMBER 1890

The President of the Republic, to its inhabitants, makes known:

That Congress has ordered the following:

"The Senate and the House of Representatives of the Republic of Nicaragua

DECREE:

Sole: The Treaty of Limits between Nicaragua and Costa Rica, signed by their respective Plenipotentiaries on 23 December 1890, consisting of nine articles, is approved, the text of which reads as follows:

The Republics of Nicaragua and Costa Rica, being animated by the desire to give due compliance, in a friendly manner, to the Treaty of 15 April 1858 and arbitral award of the President of the United States of America, issued at Washington on 22 March 1888, and taking into account the difficulties which have not permitted, within the time period prescribed in Article 10 of the Arbitration Convention signed at Guatemala on 24 December 1886, the implementation of the measurements and demarcation set out in paragraph two of the aforesaid article, have resolved to conclude all matters conducive to the realization of said desire. For this purpose, the President of the Republic of Nicaragua has appointed his Plenipotentiary, D. Benjamín Guerra, Minister of Foreign Affairs, and the President of the Republic of Costa Rica, D. José María Castro, who having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

Article I

A second period of thirty months, beginning on next January 1, is fixed to carry out the measurements and demarcation prescribed in Article 3 of the Treaty of 15 April 1858 and in Article 10 of the Convention of 24 December 1886.

Article II

The Commissioners appointed by the Governments of Costa Rica and Nicaragua to carry out the demarcation of the boundaries between the two

Republics, according to the provisions of the Treaty of 15 April 1858 and the Arbitration Convention signed at the city of Guatemala on 24 December 1886, will proceed to its implementation on the Atlantic side, tracing a straight line, beginning at a point on the coast in front of the sea, two hundred meters east from the seawall being built by the Canal Company, and ending at the extremity on the right bank of the nearest stream of the San Juan River. From this point, the line shall continue along the right bank of the same stream up to the right bank of the Ánimas stream and that of the San Juan River, until it reaches the point indicated in the Treaty of 1858.

The two hundred meters mentioned in the first part of this article shall be measured from the coast, as it is on the date when the demarcation of the boundaries begins and in such way that the line defining the aforesaid two hundred meters forms a straight angle with the seawall.

The Commissioners shall fix the departure point on the coast in front of the ocean through coordinates.

Article III

To avoid any difficulties in the future regarding accretions in the territory that belongs to Nicaragua, to the east of the seawall, it is stipulated that, in such case, a straight line shall be traced from the starting point of the dividing line towards the true North, and all the land located west of said straight line shall belong to Nicaragua.

Article IV

For greater clarity, a reduced copy of the map of the San Juan del Norte Bay drawn up by the engineers of the Canal Company in December 1888 shall be attached to this Treaty. This map shall serve as a guide for the Commissioners of both Republics in tracing the dividing line, which is marked with a red line for identification purposes.

Article V

Nicaragua shall have the right to navigate on Harbor Head Bay and on that part of the Ánimas stream which is located in Costa Rican territory and flows out into the aforesaid Bay, in the same terms that Costa Rica has the right to navigate on the San Juan River, up to a point three miles below the Old Castle.

Article VI

Being of great importance for the two friend and brother States that the population of one State comes as close as possible to the population of the other State for greater respectability, linkage of interests and mutual assistance, it is stipulated that if Costa Rica does not obtain, in its opinion, a competent extension of the coast at the Bay of San Juan del Norte, which is common to the two Republics, by interposition, at any time, of the land that according to this Convention should belong to Nicaragua, and it makes it difficult to load and unload all classes of merchandise, Costa Rica shall have the right, so that it has coastal access, as both Republics desire, to freely use that portion of land between the San Juan Bay and the right bank of the stream that is next to the starting point of the dividing line. This right shall be exercised over a surface limited in all its extension by two parallel lines, two hundred meters apart from each other. The purpose of the aforesaid right of use is to transport, load and unload all kinds of merchandise, without restriction, build railways and wharves; establish offices, commercial stores and residential houses, which shall be subject, as well as the persons who inhabit this tract of land, to the jurisdiction and laws of Costa Rica. The aforementioned right shall not terminate, unless it is necessary to excavate the land for any expansion of the port, in which case Costa Rica shall have coastal rights within its own territory.

Article VII

So that Nicaragua has sufficient space of non-rocky coast at Salinas Bay for loading and unloading all kinds of merchandise, it is stipulated that the dividing line between both Republics on that side shall begin at a point on the Sapoá River, as determined in the aforesaid award, and rather than continuing to the center of the Salinas Bay, as provided in the Treaty of 15 April 1858, it shall end at another point on the coast, two nautical miles from Punta Mala towards the southeast.

Article VIII

These stipulations shall not modify the rights of either of the two parties in the bays of San Juan del Norte and Salinas.

Article IX

This Convention, upon approval by the Executive branch of each of the contracting Republics and ratification by their respective Congresses, shall be exchanged at this capital city, within sixty days from the last ratification.

In witness of all the stipulations made in the foregoing nine articles, we, the Plenipotentiaries of Nicaragua and Costa Rica, sign this Treaty in duplicate and affix thereunto our respective seal at the city of Managua, on the twenty-third of December of the year one thousand eight hundred and ninety. Benjamín Guerra. José Ma. Castro. The Government: Having reviewed the foregoing Treaty, it is approved. Managua, 24 December 1890. Sacasa. Minister of Foreign Relations. Guerra.

Done at the Assembly Hall of the Senate. Managua, 11 November 1891.

Alejandro Argüello, S.P.

Jorge Bravo, S.S.

Franco. López G., S.S.

Annex 13

MATUS-PACHECO-LAINFIESTA PRELIMINARY TREATY OF PEACE. MANAGUA, 26 APRIL 1898

The National Legislative Assembly

DECREES

Sole. The Peace Treaty concluded between the Greater Republic of Central America and Costa Rica is hereby ratified, with the modifications set forth therein:

In neutral waters of the Pacific Ocean, aboard the U.S. warship "Alert", generously offered for the occasion by His Excellency Mr. William L. Merry, Plenipotentiary Minister of the United States of America to the Government of the Republic of Costa Rica, and finding themselves at Cabo Blanco, 9° 26' 45'' latitude North and 85° 03' 30'' longitude East, the undersigned, Manuel Colonel Matus, Plenipotentiary of the Greater Republic of Central America; Ricardo Pacheco, Plenipotentiary of the Republic of Costa Rica; and Francisco Lainfiesta, amicable mediator and Plenipotentiary of the Republic of Guatemala, having exchanged and examined their respective Full Powers and found them to be in due form, make known in the most solemn terms that the respective parties having stipulated previously their wish to amicably settle the disagreements that unfortunately have arisen between the Republic of Costa Rica and the Government of Nicaragua, which forms part of the Greater Republic of Central America, and that have led to the imminent danger that war might break out between them, a deplorable situation from any standpoint; and both being willing to achieve the civilizing and honorable aims which have caused the present meeting to take place, formulate and agree the following points of brotherly and peaceful agreement, by virtue of which from this moment onwards the contending parties cease and desist from any hostile intent by means of weaponry, and reestablish the good intelligence and harmony in which it is fit to exist, for the good of these sister peoples and the honor of Central America. The two countries therefore declare and agree:

Article I

The Greater Republic of Central America and the Republic of Costa Rica, respectively, in deference to the friendly plea interposed by the Government of Guatemala and the just claim of the general interests of Central America, no less than the advantages to the sister peoples of Nicaragua and Costa Rica, today in disagreement, freely accept the recourse of a peaceful and amicable covenant that brings to an honorable conclusion the conflict that has led them to take up weapons.

Article II

Accordingly, the forces of both parties stationed on the border, with the exception of the small garrisons established also in times of peace, shall be simultaneously concentrated and licensed by both Governments, as soon as and on the day on which the mediating Minister so determines and upon his return to land makes known by telegraph the conclusion and signing of this Agreement. This act carries implicit that the two peoples shall return to their normal state of tranquility and the cultivation of their relations, temporarily interrupted by the menace of war.

Article III

Having taken recourse to the civilized and cultured means of arbitration, which even warlike peoples recommend when seeking to settle international disputes, the High Contracting Parties agreed to submit their mutual complaints and claims to the decision of a tribunal made up of three Central Americans citizens, one appointed by the Greater Republic of Central America, one by the Republic of Costa Rica, and a third by the Republic of Guatemala, the latter in the role of peaceful mediator.

Article IV

The aforementioned arbitrators shall meet in the capital of the Republic of Guatemala within a period not to exceed one month upon the ratification of the present Agreement by both parties, for the purpose of conveniently organizing and proceeding to the compliance of their commission, adjusting the arbitration procedures to the following rules:

1. Within one month following the date of establishment of the Arbitration Panel, the contracting Parties shall present, through their representatives, their respective detailed complaints and claims in writing;

2. On the date of expiration of the term referenced in the foregoing rule, the Arbitrator shall deliver to the representative of each Signatory Party a true copy of the demands submitted by the other Party so that it may file an answer within one month;

3. Upon lapse of said term and presentation or non-presentation of the answers, the Panel shall grant the Parties a one-month term to submit the evidence of the facts as may be required;

4. Upon expiration of said term and within the next two months, the Panel shall render its decision;

5. At the request of any of the Parties or ex-officio, the Arbitration Panel, at any stage of the process, may request either of the Parties to provide any documents, data or reports that may be required or deemed convenient.

The Panel, in agreement with both Parties, may reduce or increase the indicated terms, for the purpose of concluding the proceeding at an earlier date or better clarifying the facts.

Article V

The claims made by either of the Parties, regardless of their nature and scope, shall be freely submitted to the consideration and decision of the Arbitration Panel, in accordance with the Law of Peoples, in such terms as it deems fair and equitable.

Article VI

Both Parties declare that no claims shall be submitted to the Arbitrator regarding the boundary questions that were resolved in the Treaty of 15 April 1858, in the arbitral award of President Cleveland, or in the San Salvador Convention of 1896.

Article VII

The Arbitrators shall hear and render a decision acting as arbitrators and amicable compositeurs, taking into account the benevolence with which the annoying incidents that have occurred between brothers should be treated and the benefits of an immediate settlement, dictated by the amity that should prevail over the common interests of Central America.

Both contracting Parties undertake in the most formal and solemn manner to faithfully observe and comply with the arbitral decision as may correspond to each one, without making any claims of any nature.

Article VIII

A definitive Peace and Amity Treaty shall also be entered into in Guatemala City, within the time frame set by the interested Governments, between the Plenipotentiaries of the Republic of Costa Rica and the Greater Republic, one from each party, and a third to be appointed by the Government of Guatemala and who shall act as mediator. The aforementioned Treaty shall stipulate all of the conditions and commitments the parties see fit to agree upon for the purpose of ensuring between the people of Costa Rica and Nicaragua, in a stable and solid fashion, that cordial intelligence serves to dispel all reasons for disagreement, with the aim that the peace and quiet which both are called upon to enjoy, are not altered again as has recently occurred. In addition, this definitive treaty shall include a solemn commitment by both peoples to renounce to the use of arms for settling their disputes before having first appealed to the beneficial recourse of arbitration.

Article IX

The Plenipotentiary Mediator in representation of Guatemala undertakes to request that his Government act as guarantor of the faithful compliance of the obligations assumed by each Party under said Treaty.

Article X

This Agreement shall be submitted immediately to the ratification of the legislatures of the States of Nicaragua, Honduras and El Salvador, for the purpose of obtaining the approval of these High Bodies as regards the submission of the respective complaints and claims to the decision of an arbitrator, so as to proceed without delay, once said higher authorization is issued, to comply with the provisions set out in the respective articles of this Treaty.

Article XI

The representatives of the Greater Republic of Central America and the Republic of Costa Rica, on behalf of their Governments, express their gratitude to the Government of Guatemala for its efficient cooperation in the amicable agreement reached by the parties, as well as to its worthy representative, the Honorable Minister Doctor Francisco Lainfiesta, who has so nobly interpreted the fraternal sentiments of his mission.

In witness whereof, and in full agreement, we hereby sign and seal three identical copies, as stated above, aboard the U.S. Navy warship "Alert", and in the presence of its Captain E. H. C. Leutze, who also sets his signature, certifying the position of the ship in neutral waters of the Pacific Ocean, at four in the afternoon on the twenty-sixth day of April of eighteen hundred and ninety-eight.

(L. S.) M.C. Matus

(L. S.) Ricardo Pacheco

(L. S.) Franco. Lainfiesta

(L. S.) E. H. C. Leutze, Commander

Managua, 2 May 1898

Having seen the Peace Preliminaries signed at four o'clock in the afternoon of the twenty-sixth day of April past, aboard the U.S. Navy warship "Alert", in neutral waters of the Pacific Ocean by Doctors Manuel Colonel Matus and Ricardo Pacheco, respectively the Ministers Plenipotentiary for the Greater Republic of Central America and of Costa Rica, and Mr. Francisco Lainfiesta, Envoy Extraordinary and Minister Plenipotentiary of Guatemala, the mediating power, for the purpose of reestablishing good intelligence and setting the means by which to resolve the difficulties that have arisen between the former; and having found that the aforementioned preliminaries are in full accordance with the instructions given to Minister Matus to that end, the Congress agrees to extend its full approval.

Rafael Reyes
Pedro H. Bonilla
E. Mendoza

Given in the Sessions Hall – Managua – 25 May 1989.

Alejandro Baca D.P.
L.R. Mairena D.S
Gabriel Rivas D.S.

Carry out. - National Palace – Managua, 26 May 1898.

J.S. Zelaya

Minister of foreign Affairs

Erasmo Calderón.

Annex 14

ZEPEDA-JUÁREZ-WHITE CANALIZATION CONTRACT. LEON, 27 AUGUST 1849

LEÓN, 1849

Ministry of Foreign Home Affairs
of the S.D. of the State of Nicaragua,

D.U.L.

Government House: Santiago de Managua

September 26, 1849

Mr. Prefect of the Department:

The President of the State has sent me the following decree.

"The Director of the State of Nicaragua to its inhabitants: Whereas the extraordinary Legislative Assembly has decreed the following: The Senate and House of Representatives of the State of Nicaragua, assembled at an extraordinary session,

DECREE:

ARTICLE 1. The maritime canalization contract concluded and signed in the city of León on the twenty-seventh of August last by Licentiates Hermenejildo Zepeda and Gregorio Juarez, Commissioners of the Government of the State, and Mr. David L. White, representative of the North American Company, is ratified, the text of which reads as follows:

"The Supreme Director of the State of Nicaragua and the Atlantic-Pacific Maritime Canalization American Company, made up of Messrs. Cornelius Vanderbilt, Joseph L. White, Nathaniel H. Wolfe and their partners, all citizens of the United States, being desirous of concluding the terms of a contract that facilitates transit through the isthmus of Nicaragua, from the Atlantic to the Pacific Ocean, through a maritime canal or railroad, have resolved for that purpose to appoint Commissioners, to wit: The

Supreme Director of the State of Nicaragua, Licentiates Hermenejildo Zepeda and Gregorio Juarez, and the aforementioned Company, Mr. David L. White, conferring upon them full powers to conclude and sign a contract for the aforesaid purpose, who, after exchanging their powers, have agreed upon the following articles:

ARTICLE 1

The State of Nicaragua grants to the Company the exclusive right and privilege to build a maritime canal through its territory, at its own expense and through a single route, from the port of San Juan de Nicaragua, to any other more feasible point on the Atlantic, to the port of El Realejo, the Gulf of Amapala or Fonseca, Tamarindo, San Juan del Sur, or any other point on the Pacific ocean that the Company's engineers designate, using the San Juan River, Lake Nicaragua, Tipitapa River, Lake of Leon, or any other rivers, waters or lands located within its territory, with the objective of uniting the two oceans and making use, for its construction and navigation, of the rivers, lakes, bodies of water and wastelands or private properties. The State further grants in like manner to the Company the exclusive right to dispose of, manage, and administer the canal based on the following articles:

ARTICLE 2

The dimensions of the canal shall be those that are necessary for transit of all types of ships, and the place where it shall flow into the Pacific, if two or more places are practicable, according to the decision of the engineers, shall be chosen to meet the best interests of the State and the Company.

ARTICLE 3

The Company undertakes to build at its own expense, at the ports situated on the extremities of the canal, customs houses with the necessary capacity for use by the State and the Company.

ARTICLE 4

The exclusive rights and privileges granted by the State to the Company in the present contract shall be enjoyed during a fixed term of eighty-five years, counted from the date that the canal is built and put in operation.

ARTICLE 5

By virtue of the present contract, the Company agrees to pay to the State for this concession the following sums of money, to wit: 1. Ten thousand pesos in an order of payment against the Company at the city of New York, as soon as the contract is ratified by the State Legislature; 2) Ten thousand pesos upon the expiration of one year, counted from this same date; and 3)

Ten thousand pesos on each subsequent year until the canal has been completed. The aforesaid sums shall be paid to the State in the city of Leon, or in New York City, as the State may choose. Likewise, the Company makes a free donation to the State of two hundred thousand pesos in Company shares, which shall be delivered to the State as soon as the certified shares are distributed by the Company.

ARTICLE 6

The State shall receive for its share in the canal's income, once it is in operation, the following interests: twenty percent of the annual net income during the first twenty years, after deducting an annual interest of seven percent for the capital employed in the construction; twenty-five percent of the annual net income during the following years, after deducting seven percent, until the full term stipulated in the present contract expires. Likewise, the State shall receive ten percent of the net income, without any deduction of interest, for any route that the Company establishes between the two oceans, whether by railroad or carriage, or by any other means of communication, during the twelve years granted in the present contract for the construction of a canal.

(...)

ARTICLE 17

The Company agrees to transport through the Canal all passengers, goods, merchandise and materials of any description that are entrusted to it, and further stipulates that the canal shall serve for the transit of vessels from all nations, subject to fixed and uniform rates established by the Company.

ARTICLE 18

The Company shall establish fees or tolls for the transport of passengers, goods, merchandise and property of any description, and for all types of vessels passing through the canal, which fees and tolls shall enter into force as soon as they are communicated to the Government of Nicaragua, which shall be bound to approve them within eight days from the date of receipt. At the same time, with the objective of drawing the broadest business to this route, the Company agrees to fix the aforementioned fees and tolls at the lowest price possible in accordance to the mutual interests of the State and the Company, and if the Company decides, at any given time, to change such fees and tolls, it shall be bound to notify such decision, not less than six months in advance, on the public newspapers of the State of Nicaragua, and at the major port cities of the United States.

ARTICLE 19

The transit fees and tolls for products and goods originating from the State of Nicaragua and neighboring States shall be fixed at a more favorable rate agreed by the State and the Company.

ARTICLE 20

The State grants to all the Company's steamships and sailboats, during the life of this contract, the right to enter and leave its ports, either on the Atlantic or Pacific, or in its inland rivers and bodies of water, and use thereof, free of all fees and tolls, for example, anchorage, tonnage, etc.

(...)

ARTICLE 23

The exclusive right acquired by the Company under this contract to navigate on the lakes, rivers and waters of the State with steamships, from one sea to the other, shall be understood not to preclude natives from free inland navigation on sailboats or any other type of vessels other than steamships.

(...)

ARTICLE 25

The Company shall carry on any of its steamships or sailboats navigating on the canal route, all official State correspondence, free of charge. In consideration thereof, the State agrees not to impose or collect any charges or fees on any Company correspondence.

(...)

ARTICLE 27

The State of Nicaragua, with the objective of facilitating the colonization of the land next to the San Juan River, the canal to be built thereon and adjacent confluent and affluent rivers, makes a free donation to the Company of eight stations, or sections of land, situated at such points on any bank, or on both banks of the river or canal that the Company chooses, each section eight English miles in width, measured from the edge of the canal or river to the interior. The State further grants to the Company the right to transfer the lands comprised therein to the possession of settlers or any person or persons who wish to settle thereon.

These sections of land are granted under the following conditions: 1) They shall be chosen by the Company in such way that they are at least three English miles apart from each other; 2) None of them shall be chosen within a distance of four and a half English miles from the mouth of the San Juan River, 3) The State reserves its right over those points that are necessary for military fortifications and public buildings; 4) The lands granted may not be transferred to settlers until six months have lapsed after the reconnaissance of the canal route begins; 5) The State reserves its eminent domain and sovereignty over said lands and its habitants; and 6) These lands may not be transferred to any Government.

(...)

ARTICLE 30

The Company shall have the exclusive right to build railways, carriage roads and bridges, and to set up boats and steamships on said rivers and lakes as necessary adjuncts for promoting the construction of the canal, but the Company hereby stipulates and agrees, if the construction and conclusion of the canal, or any part thereof, is not possible as a result of the occurrence of any act of God or inevitable accident, to build a railroad, a carriage road or a means of communication by water between the two oceans, if possible, within the same period stipulated for the construction of the canal, subject to the same terms, conditions, regulations and restrictions as may be applicable.

(...)

ARTICLE 32

The State also agrees to protect and defend the Company with respect to the full enjoyment of the rights and privileges granted thereto under this contract, and also agrees not to grant or contract to any Government, individual, or any other company the right to build a maritime canal, railroad, or any other inter-oceanic route through its territory, or the right to navigate on the rivers and lakes occupied by the Company for steamships, as long as this contract remains in force. However, if this contract ceases to have effect, then the State shall be free to contract any other individuals or companies, as it may deem most convenient.

(...)

ARTICLE 36

It is expressly stipulated by the State of Nicaragua that all vessels, products, manufactured goods and citizens of all nationalities shall be allowed passage through the canal (proposed to be built through the national territory), subject to the same duties and taxes established in respect of the United States, provided that said nations sign the treaties, stipulations and guarantees hereinafter made between the State of Nicaragua and the United States with respect to the canal.

(...)

In witness whereof, we, the respective Commissioners, sign and seal this contract in triplicate at the city of Leon of the State of Nicaragua this twenty-seventh day of August, in the year of our Lord one thousand nine hundred and forty-nine. *Hermenejildo Zepeda. Gregorio Juarez. David L. White.*

ARTICLE 2: The present Contract shall also be ratified by the Representative of the Company, Mr. David L. White, who is fully and duly authorized for this purpose. Upon approval by the Executive branch, it shall be published and considered as a law of the State.

Done at the Sessions Hall of the House of Representatives in Santiago de Managua on this twenty-second day of September of 1849. *Apolonio Orozco, R.R. Santiago Solorzano, A.R. Rosalio Cortez, A.R.* To the Executive branch, Senate Hall, Santiago de Managua, September 25, 1849. *Jesús Robleto, R.S. Liberato Cortes, A.S. Toribio Terán, A.S.* Therefore: Execute. Santiago de Managua, September 26, 1849. *Norberto Ramirez.* To Licentiate Sebastián Salinas, Secretary of State at the Department of Foreign Affairs.

And by Supreme Order, I hereby transcribe it for your knowledge and other purposes.

Salinas

The present contract having been duly ratified by the Legislature of the State of Nicaragua, now, for this reason, I, *David L. White,* Commissioner on behalf of the U.S. company Atlantic Pacific Maritime Canal Company, vested with full powers conferred upon me by the parties for this purpose, hereby accept, ratify and confirm said contract, and each of the clauses and articles set out therein. In witness whereof, I have hereunto set my hand and affixed my seal. Done at the city of Managua, on this twenty-sixth day of September in the year of Our Lord, one thousand eight hundred and forty-nine. (Seal) *David L. White*

Norberto Ramirez, Supreme Director of the Republic of Nicaragua in Central America, whereas the Legislative branch of the Republic decreed yesterday, and the Executive branch sanctioned today, the solemn ratification of the contract for the construction of a maritime canal from the Atlantic to the Pacific, which was signed on 27 August last by the Commissioners of the Supreme Government and the Representative of the Company of the United States of America, Mr. David L. White, therefore,

DECREES:

Sole Article: The Republic of Nicaragua accepts, ratifies and confirms each and every article in this contract. Therefore: publish, execute and circulate as a law of the State, delivering this signed copy to the above-named representative of the aforementioned Company, who has also delivered a signed copy, duly ratified, to the Secretary of State at the Department of Foreign Affairs.

Done at Santiago de Managua in the House of Government; sealed with the seal of the Republic, and initialled by the undersigned Secretary of State and the Department of Foreign Affairs, on this twenty-sixth day of September of one thousand eight hundred and forty-nine. (Seal) *Norberto Ramirez.* To Mr. Sebastián Salinas, Secretary of the Department of Foreign Affairs.

Annex 15

IRISARRI-STEBBINS CONTRACT. NEW YORK, 19 JUNE 1857

The President of the Republic of Nicaragua to its inhabitants: Whereas the Constituent Assembly has decreed the following:

The C. A. of Nicaragua, in use of the full powers conferred upon it by the people of the Republic,

Decrees:

Article 1

Each and every part of the contract adjusted on 19 June last between Mr. Antonio José de Irisarri, Envoy Extraordinary and Minister Plenipotentiary of this Republic, and Mr. H.G. Stebbins, Chairman of the American Atlantic-Pacific Canal Company, and approved by the Government on 27 July last, is hereby ratified, which literally reads as follows:

Given that our highly esteemed Don Antonio J. Irisarri, Envoy Extraordinary and Minister Plenipotentiary of this Republic, near to the United States of America, by virtue of the powers granted, has concluded, decreed and signed an agreement at New York on 19 June last with Mr. H. G. Stebbins, President of the American Atlantic-Pacific Canal Company, regarding transit through the territory of this Republic and through an inter-oceanic railroad, which literally reads as follows:

Agreement between the Republic of Nicaragua, through its Envoy Extraordinary and Minister Plenipotentiary to the United States, and the American Atlantic-Pacific Canal Company. Whereas the Supreme Government of Nicaragua signed a contract on August 27, 1849, through its Commissioners Hermengildo Zepeda and Gregorio Juárez, with the American Atlantic-Pacific Maritime Canal Company, which was ratified by the Congress of the Republic of Nicaragua on September 22, 1849, amended on March 9, 1850, ratified and confirmed by the Congress of said Republic, and by decree of the Supreme Director on April 11, 1850. And whereas the dimensions of the maritime canal to be opened by the referred company were defined and stipulated in Article 2 of the referred contract. And whereas it has been ascertained and determined through detailed and complete surveys carried out by competent engineers that a canal of the dimensions stipulated in the mentioned article cannot be constructed because the bottom of Lake Nicaragua is not sufficient.

And whereas, pursuant to Article 30 of said contract, the mentioned Company is obligated to construct and establish a railroad and water communication route between the two oceans in the event that the construction of the canal was impossible due to the reasons or causes mentioned herein.

And whereas it is desirable to establish a railroad and water communication route as soon as possible in such advantageous terms for both the Republic and the Company.

The Republic and the Company have agreed upon the following modifications and additions to the referred contract:

Art. 1. The Company is released from the obligation to construct the canal, but in its stead, the Company shall establish through the territory of the Republic, between the two oceans, a water communication route and railroad within two years from the last ratification of this contract by the competent authorities of Nicaragua. Said communication route and railroad shall be established and constructed as provided in Article 30 of the aforementioned original contract, under the same terms and subject to the same conditions, regulations and restrictions stipulated therein, except those that could be changed, modified or deleted by this contract. The water communication route shall run through the San Juan River and Lake Nicaragua, and the railroad shall be constructed from said lake to the Pacific.

Art. 2. Article 6 of the original contract is deleted and rescinded and, in its stead, the following shall be inserted, viz: The State shall receive one dollar and fifty cents, legal tender of the United States of America, or its equivalent in the currency of Nicaragua, for each adult passenger carried by said company through the State; and seventy-five cents, legal tender of the United States of America, or its equivalent as stated above, for each passenger under fourteen years of age, who is also carried in the same manner by the Company. These sums shall be paid at the point of transit in Nicaragua or in New York, and at such times as that Government may designate. And for the purpose of accurately ascertaining the number of passengers carried, two copies of the list of passengers shall be scrupulously prepared for each voyage and upon the arrival of each steamship to any Nicaraguan port, said copies shall be delivered to the employees hired by the company to operate the steamships, or upon demand to the duly authorized officer or agent of the Government of Nicaragua. And the State in any case shall designate a person who shall have the right to board any of the steamships or other vessels of the Company, and to visit any of its offices and inspect the original passenger lists and any documents containing information on the number of passengers transported by said company. This article shall be applied to all passengers transported by the company through the carriage roads and water communication route during the two years granted for the construction of the railroad.

Art. 3 The company shall not transport any passenger to the Republic of Nicaragua, or receive money for fares or sell fares to any person who intends to stay in the State except for those persons or passengers who bear a passport or written permit signed by the consul or other agent designated by the State of Nicaragua who resides at the port of origin. This obligation shall be extensive to persons and passengers who do not stay in the territory of the State, and are in transit as part of their entire voyage and are traveling from one port to another port of the United States of America, said civil servants of the United States of America or Nicaragua, or bona fide agents or officers of the company. Given that the purpose and intent of this article is to prevent the carriage and disembarkation in Nicaragua of those persons who would be hostile to that State, the company commits that each and every company employee, officer and agent shall strictly comply with the provisions of this article. And if any person, without the knowledge of the company, or of the officers in charge of the steamships, secretly boards any of the steamships and is not discovered until such steamship has departed, said person shall not be allowed to disembark in Nicaragua without the permit from the competent authority of said State, and if said permit were refused, said person shall be returned to the port of origin.

Art. 4 In the event that said State was invaded by any public enemy or other, the steamships of the company may be used by the Government of Nicaragua to transport troops, ammunitions and supplies upon request to the authorities.

(...)

Annex 16

WEBSTER AND HARRIS-ESCALANTE CONTRACT.
SAN JOSÉ, 14 JULY 1857

Don Rafael G. Escalante, Minister of Finance of the Supreme Government of the Republic of Costa Rica, authorized by H.E. the President of the same, and Messrs. William Robert Clifford Webster, a British subject, and Israel Chapman Harris, a citizen of the United States of America, have agreed to enter into a contract under the following terms:

Art. 1. Having appeared Messrs. Webster and Harris before H.E. the President of the Republic of Costa Rica, with the objective of obtaining a concession for exclusive transit rights of passage, via water and land, across the isthmus of Nicaragua, through the San Juan river, Lake Nicaragua, and from the Sapoa river to the bays of Salinas or La Virgen to San Juan del Sur in the Pacific Ocean and, *vice versa*, to Punta de Castilla in the Atlantic Ocean, as well as the exclusive right of steam navigation in Lake Nicaragua. Notwithstanding the foregoing, the Government of Costa Rica has the right to permit steam navigation in the San [Juan] river up to the Old Castle, the river San Carlos and Sarapiquí, for the internal trade of the country. The aforementioned Webster [and] Harris, who believe they have a right of transit, the former by virtue of a concession from Costa Rica, and the latter on the part of the Government of Nicaragua, have agreed to amicably settle their opposed rights of transit by jointly entering into the present contract, and notwithstanding that the Government of Costa Rica is oblivious to any acquired rights over the property of transit, both those alleged by Mr. Webster, as well as by Messrs. Charles Morgan and sons, of which company Harris is a partner, both because the contract of Webster was not fulfilled and because the Government of Costa Rica cannot recognize the rights alleged by the aforesaid Charles Morgan and sons; in any case, the Government of Costa Rica agrees to enter into a new contract with Messrs. W. C. R. Webster (Harris) and J. C. Harris, their heirs, executors or assignees, for a period of fifty years, counted from the date of this instrument, for an exclusive right of transit and the privilege to cross the Isthmus of Nicaragua, via water and land, from Punta de Castilla in the Atlantic Ocean and the San Juan river, Lake Nicaragua, and the Sapoá river, to the Bay of Salinas and San Juan del Sur, through Lake Nicaragua, the Sapoá and San Juan rivers, to Punta de Castilla in the Atlantic Ocean.

2. The Government of Costa Rica grants to Messrs. Webster and Harris, their heirs, executors or assignees, for the same period, the exclusive right of steam navigation in Lake Nicaragua and in the San Juan river.

3. The Government of Costa Rica grants to Messrs. Webster and Harris, their heirs, executors or assignees, for the same period, the exclusive right to transport on the indicated routes, via water and land, at such prices as they may deem convenient, passengers, [mail pouches], gold bars or coins, merchandise, or any other articles, free of duties or charges of any kind.

4. It is prohibited to pass through the transit (route) ammunition, gunpowder or war elements, except for rifles and weapons for private use, and owned by the passengers traveling on board said vessels, but said weapons must be packed to cross the route via water and land, unless the Governments of England and the United States guarantee the neutrality and security of said transit, in which case passengers may carry their weapons, in the understanding that, upon passing in front of El Castillo, they may not carry them and would pass packed or else the rapid streams would flood the steamer.

5. The Government of Costa Rica grants, assigns and transfers to the aforesaid Messrs Webster and Harris, their heirs or assignees, all the property, movable and immovable, that said Government [apprehended] in the aforesaid route, which consists of steamers, machinery, shops, houses, galleys and materials belonging to Morgan and Garrison, which the Government shall deliver in the same condition and in the amounts that exist at the time of delivery, which shall be done when the first part of the loan (to be discussed later) has been delivered to the Government of Costa Rica.

6. The Government of Costa Rica grants to Messrs. Webster and Harris, their heirs, executors or assignees, free of all duties, up to thirty acres of land in the bay of Salinas and in the Sapoá river: in Punta de Castilla, the necessary land for their houses and warehouses, and, in San Juan del Sur and La Virgen, those portions that Messrs. Morgan and Garrison previously had in the contract, as well as the various extensions they may need for furniture, [dikes] or routes, coal deposits, houses, offices, shops, warehouses and others as may be necessary for the sound operation of the transit route.

7. The Government of Costa Rica grants to Messrs. Webster and Harris, their heirs, executors or assignees, the privilege to introduce for both purposes of transit, free of all duties, all articles destined for use of the transit route or that may be necessary for the success of the company.

Likewise, the steamers shall pass from one to the other extreme of the transit route on the Atlantic and Pacific Oceans, as well as ocean steamboats and all vessels carrying materials or supplies for the use of the contractors or their assignees; and, in the same manner, passengers, mules, merchandise, gold bars or coins, machinery or other articles in transit from ocean to ocean shall be exempt from the payment of any duties not determined in the present contract. They are also permitted to [equip] and maintain a guard to safeguard the treasures or other valuable articles along the overland transit route, which may not exceed thirty men.

8. The Government of Costa Rica grants to Messrs. Webster and Harris, their heirs, executors or assignees, the right to build the roads they may need across the Isthmus, as well as the bridges, dams, buildings and railroads that may be necessary and [beneficial] for the transit, and to cut and take wood and other materials from the country as may be necessary for [said] purposes and management of the steamers in the Lake and rivers, provided that they are taken from wastelands owned by the Government and not under private ownership, all without any kind of charges.

9. The Government of Costa Rica obliges to make every effort to obtain from the Government of Nicaragua a transfer of transit rights in favor of Costa Rica, either in the river, lake or road, [or at least] its official adherence to the concessions made in this contract.

10. The Government of Costa Rica commits to protect the contractors, their heirs, executors or assignees in the full enjoyment of the privileges and rights granted in this contract for a period of fifty years, counting those that attempt to disrupt the peaceful possession of their businesses, and also obliges not to give to any persons other than those [mentioned] in our contract, any of the aforementioned privileges during the term of this contract.

11. In consideration of the faithful performance of the obligations stipulated herein, on the part of the Government of Costa Rica, William Robert Clifford Webster and [Israel] Chapman Harris oblige to the following terms, to wit:

1. They shall organize a Company as soon as possible, and shall put in operation in the shortest time possible a steamer line between New York and San Francisco to communicate with the route, [via] the [Isthmus] of Nicaragua; the Company shall not [bring] to the transit route any filibusters or persons who could interfere in the political matters of the Governments of Costa Rica and Nicaragua and the said Company shall employ all its

influence and power to impede such persons from entering the country through any of the transit routes.

2. The aforesaid Webster and Harris Company [Ca] commits to advance to the Government, twice its obligations, the amount of $ 500,000 five hundred thousand pesos, with an annual interest of seven percent (7%), which shall be deliverable in the same manner. Two hundred and fifty thousand pesos which shall be shipped precisely in New York on the [fifth] day of September next and the amount shall be delivered to the Government no later than on the 25th of the same month.

One hundred and fifty thousand pesos shall be shipped at the same port on the fifth day of November next, and delivered to the Government in San Jose on the 25th of the same month, and the remaining one hundred thousand pesos shall be shipped on the 5th of January next at the same port and delivered and (delivered) on the 25th of the cited month in San José to the Government, which amounts shall be received by the Government of Costa Rica in legal tender of the United States or of Great Britain, including a five percent premium over the values of said currency of payment in those countries, in such manner that a sterling pound worth five pesos shall be received with the same value of the gold coins of the United States that are worth five pesos. The Company shall pay all expenses incurred in the transportation of said loan and shall bear all risks until delivery is made to the Government in San José.

3. Said Company shall pay to the Government of Costa Rica, in case Nicaragua gives its adhesion to this Contract, the sum of two strong pesos, per head, for each adult passenger who crosses the Isthmus on the Company steamers and, in equal proportion, for those passengers who pay half and one-fourth of the toll, and they commit to guarantee that the total amount of such transit right shall not produce less than fifty-five thousand pesos each year, being the said Company obliged to complete, to the Government of Costa Rica, the referred amount of fifty-five thousand pesos, if such tolls do not reach that amount.

4. The said company commits to pay to Costa Rica, in case Nicaragua refuses its adhesion to this contract, the sum of one strong peso, per head, for each adult passenger who crosses the Isthmus on the company steamers through the Sapoá and Salinas route, and, in equal proportion, for those who pay half and one-fourth of the toll, guaranteeing, in such case, that the total amount generated by the transit route shall not be less than thirty-five thousand pesos each year, and the company shall pay to the Government the balance according to the same terms set out in the

foregoing article. Accordingly, the commitment acquired by the Government with respect to the consent of the Government of Nicaragua to the transit concessions in favor of Costa Rica, and guaranteed by the Government of Costa Rica the transit through Sapoá and Salinas; and vice versa, through Salinas, Sapoá and Punta de Castilla, has been amended.

(...)

9. It is understood that the Government of Costa Rica, in case Nicaragua denies its adhesion to this Contract, shall maintain the concessions made from Punta de Castilla in the Atlantic to the bay of Salinas, San Juan river, via Sapoá, and vice versa, from Salinas to Punta de Castilla, allowing the contractors to use, for two years, the road from La Virgen to San Juan del Sur, until the road from Sapoá to the bay of Salinas is built. However, in case Nicaragua gives its adhesion to this Contract, the Company may use the road through the river Sapoá, or from La Virgen to San Juan del Sur, as it may deem more convenient.

10. The contractors commit to make every effort to obtain the protection of the governments of Great Britain and the United States, in order to obtain from said Governments the guarantee and their double protection to impede any infringement of the rights and privileges granted.

11. The Company commits to present to the [Governor] of Castilla, through the Steamship Captains, a list of the passengers that are carried on board, whether going upstream or downstream on the river.

12. Messrs. Webster and Harris, their partners and assignees, commit to [faithfully] comply with the conditions of this Contract; it being understood that in case of non-compliance with the said clauses, this Contract shall be rendered null and without effect by the same Government, upon notice is served to the Company by the Government of Costa Rica, including evidence regarding said non-compliance, and the Company shall forfeit all [rights] and privileges granted by the Government in this contract, and shall also forfeit, in favor of the Government, any property that it may have acquired by virtue of [said] contract on the transit line.

13. All concessions, gratifications and obligations acquired by the Government with Mr. W. R. C. Webster, his partners and associates, by virtue of the contract entered into on the fourth of December of one thousand eight hundred and fifty-seven as amended, is declared null and without effect.

14. It is understood that in the hypothesis that the transit route for passengers and freight is done through Sapoá and Salinas, which would generate less tolls corresponding to the Government, and would not be sufficient other than to pay the interests of the loan for five hundred thousand pesos that the Company shall make to the Government; and, in such case, the Government shall contribute each year up to twenty thousand pesos for the payment of the principal of five hundred thousand pesos until the loan has been fully paid to the company.

15. The Government obliges to give to the Company bonds for the amounts it receives from the [said] loan, which shall indicate the manner in which they shall be paid and shall be issued for the amount requested by the said Company.

16. Whenever any dispute arises between the Government and the contractors in relation to the misinterpretation of any of the articles contained in this contract, an arbitrator shall be appointed by each party to examine the question and render a decision, which shall be final and binding. Said questions must be elucidated in San José, with the understanding that the company does not have the right to withhold any amounts that correspond to the Government by virtue of this contract before the award is rendered by the [said] arbitrators.

In witness whereof we sign this contract at the National Palace, in San José, Costa Rica, on the fourteenth of July of one thousand eight hundred and fifty-seven. (Signed) R. G. Escalante (Signed) W. R. C. Webster (Signed) J. C. Harris – National Palace, Chamber of the Department of Finance, San José, fourteenth of July of one thousand eight hundred and fifty-seven. The preceding contract is approved in all its parts (Initials). Initialed by H. E. (Signed by R. G. Escalante).

It concurs.
(Calvo)

Minister of Foreign Affairs of the Supreme Government of the Republic of Nicaragua.

It concurs.

Managua, August 27, 1857
(Signed) Juarez
[Seal]

Annex 17

ZELEDÓN-ROSA PÉREZ CONTRACT. MANAGUA, 30 DECEMBER 1860

Contract entered into between H.E. Don Pedro Zeledón, Minister of Foreign Affairs of the Republic of Nicaragua, on the one part, and Don José Rosa Pérez, commissioned by Messrs. John P. Yelverston, H. G. Stebbins, Nathaniel H. Wolfe, citizens of the United States of America, and their associates and shareholders of the former Atlantic-Pacific Maritime Canal American Company, on the other part, for establishment of an inter-oceanic way through the Nicaraguan isthmus.

Article I

The Government of the Republic of Nicaragua hereby constitutes John P. Yelverston, H. G. Stebbins, Nathaniel H. Wolfe, citizens of the United States of America, and their associates and shareholders of the former Atlantic-Pacific Maritime Canal American Company, their successors and representatives, as a political and incorporated company of the Republic with perpetual succession under the name of Central American Transit Company, and bestows upon them all powers necessary so that in their capacity as a political and incorporated company they may carry out the objectives of the present contract, always in accordance with the provisions contained thereon. And the aforesaid Central American Transit Company shall have absolute management of its business: it may issue, from time to time, statutes and regulations for its internal government and with respect to the election and term of its officers and employees; the issue, transfer and loss of its capital shares; and all matters concerning the administration of its interests; and may demand and be demanded in the courts of the Republic of Nicaragua in the same manner as Nicaraguan citizens, notwithstanding and without prejudice to the nationality of the individuals that comprise it.

The aforesaid Company shall appoint from among its shareholders a Board of Directors consisting of seven individuals. These shall appoint from among themselves a President, a Vice-President, and a Secretary of the Company; and the Board of Directors, together with the President, shall have the same powers of the Company itself, and its full representation, except as expressly limited by the Company, with the understanding that said powers shall not be limited with regard to the business or relationship between the Government of the Republic and the Company.

(...)

Article V

The essential object of the present contract being as it is to establish and maintain an inter-oceanic transit route across the isthmus of Nicaragua in the service of universal trade, the Central American Transit Company assumes the obligation, and the Government of the Republic grants the exclusive right to establish, as well as to administer, use and operate, for a term of fifty years, a route of communication and transit across the territory of the same Republic, between the Atlantic and Pacific oceans; to transport all kinds of passengers, luggage, chests, merchandise and properties by land or waters, by way of any ship, including steamships, common roads, railroads or other types, and carriages, wagons, animals and any other modes of transportation, both for transit passage from sea to sea, as well as for internal trade, importation and exportation from the Republic of Nicaragua.

Article VI

The inter-oceanic route that the mentioned Company will establish, as stated in the foregoing article, will be made up of two Sections: first, an east section, via water, from the port of San Juan de Nicaragua to another [port] of the Republic that the Company elects on the Atlantic Ocean, via the San Juan River and across Lake Nicaragua, or through any other rivers and lakes of the Republic that the Company elects, up to any point that the same Company elects on said rivers and lakes; and the other, a west section, via land, from the last mentioned point, in any direction that the Company elects, to the port of San Juan del Sur or any other of the Republic on the Pacific Ocean that the Company elects.

(...)

Article VIII

The aforesaid Company has the right and obligation to open the inter-oceanic route and to supply it with sufficient river and lake steamers, carriages or wagons, animals and other modes of transportation, as required by trade, by November of one thousand eight hundred and sixty; and to keep it open and supplied, as stated above, during the term of fifty years stipulated as the life of the present contract.

(...)

Signed and sealed in Managua City on this thirtieth day of December in the year of Our Lord one thousand eight hundred sixty, by Don Pedro Zedon [Zeledón] Minister of Foreign Affairs of the Republic of Nicaragua, and José Rosa Perez, Commissioner of the shareholders of the capital stock of the former American Atlantic-Pacific Maritime Canal Company.

Annex 18

MOLINA-MORRIS INTER-OCEANIC TRANSIT CONTRACT.
WASHINGTON, 10 NOVEMBER 1863

The President of the Republic to its inhabitants

Makes known:

That Congress has ordered the following:

The Senate and the Chamber of Deputies of the Republic of Nicaragua

Decree:

Article 1. The Inter-Oceanic Transit Contract entered into on November 10, 1863, between H. E. the Minister of Nicaragua, Mr. Luis Molina, and the Central American Transit Company, by which it has been ratified, is approved and ratified in all its parts, which reads as follows:

Contract made and entered into at the City of Washington, capital of the United States, on the tenth of November of one thousand eight hundred and sixty-three, between the Supreme Government of the Republic of Nicaragua, on the one part, represented by H. E. Mr. Luis Molina, and the Central American Transit Company, a corporation organized under the laws of the State of New Jersey, United States of America, represented by Francis Morris Esquire, President of said Company, on the other part.

Whereas the Government of Nicaragua desires to efficiently establish the inter-oceanic route within its territorial boundaries and jurisdiction, and has previously agreed to a certain provisional arrangement with the said Company as a consequence of the acts of the said Government in respect of [...] declared by it by virtue of the previous contract between the parties.

Therefore, for the adjustment and conclusion of any claims and actions that mark or originate in any way from the said previous contract and provisional arrangement, and for the complete and perfect substitution of a new contract, in all the business and each of its parts, it is recorded in this contract that the said parties have agreed upon and stipulated the following:

Article I

All differences and controversies in respect to the contract previously made, namely: the transit contract approved on the twentieth of March of 1861 between the parties for the opening and operation of the inter-oceanic transit route or by virtue of the aforesaid provisional arrangement, are definitively adjusted and forever terminated by the provisions set out hereunder, being extinguished such disputes and controversies between the parties by the final and reciprocal exchange of the present contract, duly and fully ratified, in such manner that it constitutes a conclusive act according to the laws of each party.

Article II

The said Company, without relinquishing its aforesaid creation and existence, according to the laws of the said State of New Jersey, and preserving the right to obtain any extension or amendment, or any other act of incorporation in accordance with the laws of the State of New Jersey, New York and Pennsylvania, or any of them, for the purpose of providing for the organization and government of the interested parties or who could become interested in the said Company in their mutual relations; however, for any business, interests and operations related to the object of this Contract, within the territorial jurisdiction of Nicaragua, it accepts and acknowledges the nationality of Nicaragua with the same latitude and in respect of all cases and similar effects that are applicable and correspond to a merchant of the United States domiciled in the territory of Nicaragua with objects of commerce, in accordance with the principles of the law of nations, except where these could be amended by the provisions of this contract, always with the understanding that, being the Company from the United States and comprised of U.S. citizens, it shall always have the same rights and remedies that would correspond, in accordance with the principles of the law of nations, in the case of denial of justice, recognized by that Code to a merchant of the United States domiciled in Nicaragua with objects of trade.

(...)

Article IV

In consideration of this privilege, the said Company agrees to pay during the continuation of the referred purchase to said Government, in gold or silver coins of the United States, at the option of the said Government, and in Managua or New York, at the same option, by way of exchange, and in full satisfaction of all passenger tolls (capitation) on the transit route, the amount of twenty thousand pesos ($ 20,000) each year during the first seven years of the term of this contract; the annual amount of twenty-five thousand pesos ($ 25,000) during the next eight years: and the annual amount of thirty thousand pesos ($ 30,000) during the remainder of the term. And the Government of Nicaragua shall deliver notice, three months in advance, regarding the designated place of payment and whether payment shall be made in gold or silver. Further, so that the Government of the Republic has proper and accurate statistics regarding the amount of freight that passes through the inter-oceanic transit route granted in this contract, the Central American Transit Company also agrees to pay to the Government of Nicaragua, in addition to any other payments, five cents per ton over the amount of freight transported by it each year; and the Company shall send each year a sworn statement, which shall be conclusive with respect to the amount of said freight transported by her, paying upon delivery of said annual statement the five cents per ton that shall be paid as previously stipulated.

Article V

The Company obligates to open the inter-oceanic route between San Juan del Norte and San Juan del Sur within six months from the date on which the Minister of Nicaragua in Washington delivers written notice to the same Company in New York that the present contract has been ratified by Congress and has been approved by the Executive of Nicaragua, with sufficient steamers on the river and lake, and sufficient land transportation materials to carry five hundred passengers with their usual luggage, at least twice a month, in one single trip, and to keep the transit route open during the life of this concession. Further, in consideration of the privilege expressed hereunder, [the Company] agrees to invest, within a term of ten years, the sum of five hundred thousand pesos ($ 500,000) in the development of improvements and establishments (permanent) on Nicaraguan soil, including the cost of a steam towboat that the company obligates to furnish, and including the improvements that the parties have agreed to make in the port of San Juan del Norte and in the San Juan River, outside and in addition to the cost of the steamers on the river and lake, which cost is not included in the expenditure referred above. And so that the Government of Nicaragua has proper knowledge of the expenditure, it may examine the books of the Company once a year through one or more agents appointed for this purpose.

Article VI

Further, by virtue of the aforesaid consideration, the said Company agrees to spend, within a term of six years, a minimum amount of sixty-five thousand pesos ($ 65,000) in the improvements at the port of San Juan del

Norte, in the navigation of the San Juan River, improvements in the rapid streams, etc., in the following manner, and subject to the conditions and stipulations set out hereunder, to wit:

The Government of Nicaragua shall arrange for survey at the port of San Juan del Norte and the said San Juan River, by an expert from the Government, in order to determine whether said improvements may be permanent and, if so, how to commence and continue said improvements so that, upon completion thereof, the port and river shall not only be improved, but shall also be protected, if feasible, from any reduction in depth by the action of natural causes. The Company agrees to provide to the expert from the Government and to his group, all kinds of facilities to expedite the completion of such work, such as transportation, supplies, etc., etc. If, upon completion of said survey, the executive branch of the Government of Nicaragua approves the respective report presented by the expert, the Company obligates to commence immediately thereafter the improvement scheme thus recommended, and to continue such works according to the following stipulations: The Company agrees that the amount spent in the improvements thus recommended shall comprise at least the following: twenty-five thousand pesos in the improvements to be made at the port of San Juan del Norte, in addition to twenty-five thousand pesos in respect of the improvements to be made between the port of San Juan del Norte and the Colorado River; at least five thousand pesos in respect of the improvements to be made in the extension of the rapid streams at Machuca; an equal sum of five thousand pesos in the rapid streams at Castillo; and an equal sum of five thousand pesos in the rapid streams at Toro; for a total expenditure of fifteen thousand pesos in the improvements at the Machuca, Castillo and Toro rapid streams, bringing the total cost of the improvements at the sandbar and port of San Juan del Norte, and at the San Juan River, to at least sixty-five thousand pesos, without including the cost of the steamers on the same river or the cost of the towboat to be furnished at the port of San Juan del Norte. The Central American Transit Company obligates to pay to the Government of Nicaragua, in addition to any other expenditure or payment, the sum of five thousand pesos, in strong currency, to pay the government engineer who shall carry out the aforesaid survey. The Central American Transit Company hereby agrees to purchase, for the opening date or before the opening date of the transit route, as stipulated in this contract, and to maintain a steam towboat in operation while the depth of the sandbar is shallow, according to the stipulated dimensions, for the purpose of towing ships in and out of said port, loading and unloading passengers, luggage and freight, and making a connection at the port between larger ocean steamships and the steamers on the river. And the Company further agrees to hire a Captain for said towboat, who shall be a professional in his field and shall have the duty of using the towboat, whenever it is not being used for any other purpose, to increase the depth of the sandbar at San Juan del Norte; and the said Company further agrees to commence, after this contract has been ratified and approved by the executive branch of Nicaragua, the implementation of temporary improvement works in the river and port, which shall be conducive, in the opinion of the government engineer, to the permanent improvement of the said port and sandbar.

Article VII

In compensation for the foregoing stipulations by the said Company, the Government agrees and grants the following:

As of the date of final ratification of this contract by the Government of Nicaragua, the said Company shall enjoy, for a term of twenty-five years, counted from the aforesaid date, and subject to the provisions regarding nullity during the life of this contract, as stipulated hereunder, the exclusive right of inter-oceanic transit for passengers, luggage, chests, treasures, cargo and articles of trade in general, by land or sea within the following limits: by way of water, said Company will have exclusive rights of navigation as part of the inter-oceanic traffic and only on that part from the San Juan river from the Atlantic through to bay of la Virgen in lake Nicaragua, or any other lacustrine port, between the boundary line of Costa Rica and the latitude of the town of San Rafael and the northern coast of the island of Zapatera, as the said Company may determine from time to time during the life of this contract, being said exclusive privilege of navigation expressly limited to the sole inter-oceanic transit route granted hereunder, with the understanding that the Company's exclusive privilege of inter-oceanic transit shall not restrict in any manner whatsoever internal trade in the country, in which the Company may employ its ships and other modes of transportation, without excluding competitors, and without any special exemption for its steamers other than mooring and tonnage fees, and the Company in all other respects related to said internal trade shall be on an equal footing with the citizens of the Republic of Nicaragua, whose right to navigate on boats or steamers in the internal waters of the Republic for the purpose of the said internal trade shall not be limited by these stipulations. And in respect of the land route for the said inter-oceanic transit, the said Company shall have the right to enjoy, for a term of twenty-five years, except if previously revoked and annulled according to the terms of this contract, the exclusive privilege to establish and use any railroad that it may put into operation between the said Lake Nicaragua and the Pacific Ocean, between the parallel latitude of San Rafael and the northern coast of the island of Zapatera and the boundary line between Nicaragua and Costa Rica; and in like manner, it shall also have the exclusive right to use and enjoy, in respect of the inter-oceanic transit route, the road that exists between the bay of La Virgen and S. Juan del Sur, which the Company hereby obligates to improve and put in perfect condition, or any other similar road that may be opened and built in the tongue of land described heretofore. And the said Company hereby obligates to build and effectively put into operation, within four years from the date of notice regarding the ratification of the present contract, as part of the said inter-oceanic transit route, an adequate and sufficient railroad, including all adequate and sufficient locomotion materials and equipment, between Lake Nicaragua and the Pacific Ocean, from the bay of La Virgen to San Juan del Sur, or from any other point in the Lake to any other point in the Ocean that the Company may determine within the limits set out heretofore. It is also understood and agreed that any notice to be given by the Company to the Government of Nicaragua, in accordance with the terms of this contract, shall be delivered to the Government of Nicaragua, in the capital of the Republic, by the Resident Agent of the Company in the country, and any notice to be given by the Government of Nicaragua to the Company shall be delivered to the President of the Company in New York by the Minister of Nicaragua in Washington, or by its Consul in New York. This stipulation is not applicable to any judicial notices that may be served to the Company's Resident Agent in Nicaragua, as provided hereunder.

Article VIII

The Company obligates to transport, free of charge, on the regular trips made by its steamers on the river and Lake, the employees that the Government sends on public duty, as well as to relieve every three months the garrisons on the route, including their belongings, baggage and supplies, as well as the mail pouches of the Republic of Nicaragua.

(...)

Article X

Being the intention of the Government that the inter-oceanic route that the Company shall establish be open to service for all the nations of the world, the Company shall transport, on its route and under equal conditions, any persons and any type of merchandise that arrives for this purpose, either at the terminus ports of the route or at any regular stations or piers on the River or on the Lake, regardless of their nationality or place of origin. But the Government reserves the right to determine what troops, war ammunitions and foreign mail pouches may pass through its territory, and be carried or allowed to be carried by any means of transportation, even if these are not owned by the Company. The Company shall fix and shall deliver written advance notice to the Government regarding the general schedule of its transportation prices on the route, with the understanding that it shall be identical for everybody; and the Company shall not evade in any way whatsoever, through payment of any discount or otherwise, the terms of this article regarding the establishment of a single tariff for everybody, which tariff shall not be altered, except if such alteration shall enter into effect six months after it has been communicated to the Government in writing.

(...)

Article XII

If the Government of the Republic were a party to any previous contract or convention, still in force, or entered into hereinafter, for the construction of a maritime canal across its territory, and the duration of the rights and privileges stipulated in the present contract were not compatible with the terms and conditions of said contract or convention, then, in such case, the rights and privileges stipulated in the present contract would only remain in effect until the maritime canal works were completed, in accordance with the terms of said contract or convention, and shall not be hampered or impeded while said canal is not in full operation from ocean to ocean.

(...)

Article XIV

For the purpose of facilitating the achievement of the objects of the present contract, the Government exempts, from all civil, military, national or municipal service, all the individuals who are employed by the Company on the route and have been at the service of the Company for three consecutive months, including the coachmen, wagon drivers, animals and vehicles of the Company, as well as the coachmen, wagon drivers, animals and vehicles of contractors carrying passengers; but this exemption shall have no effect in the event of a foreign invasion, except for the coachmen, wagon drivers, animals and vehicles of the Company. And the capital represented by the works on the route, as well as any kind of property employed in the service of the same, shall be at all times exempt from imposts, duties and levies on the part of any authority of the Republic.

Article XVII

The Government warrants that all vessels arriving to the outfitted maritime ports, at each extreme of the inter-oceanic route, carrying passengers or freight of any class, as well as any vessels employed in the service of the same route, at all times may enter, leave, navigate and use said maritime ports, as well as the Lake and the river of San Juan del Norte, exempted from mooring, tonnage and any other duties. And all vessels on the Lake and River employed in the Inter-Oceanic Transit, as well as all passengers and freight of any class that the Company transports on the transit route from ocean to ocean, shall be exempted from any registration, interruption and detention and from all duties or levies. But if the Government, owing to the circumstances, should deem it necessary for the security of the country to register the steamers, then they shall be registered when passing by one of the fortresses on the route. The Company, on its part, agrees that it shall not deliver any freight intended to remain in the country, unless written detailed notice is provided in advance to the tax agent at the place, being the same Company responsible for any breach of this provision on the part of its employees in accordance with the laws of the country.

Article XVIII

The Company, without being obligated to pay any tax or duty, may introduce into the Republic any materials, machinery and other things that are useful and necessary for the establishment, repair and use of the inter-oceanic line; it may take wastelands located within the Republic, as well as materials and firewood from said wastelands for the same purposes; it may occupy such places as it may require for the main establishments and accessories of the route, provided that such places are not intended for public works nor are privately owned, in which latter case the Company may occupy them after indemnifying the owner in advance at the fair price fixed by experts, with the understanding that the Company, upon introducing the aforesaid useful articles to the Republic, shall deliver written advance notice to the Administrator of the port where it intends to make such introduction, and provided that if the said Company occupies land or takes materials or firewood therefrom, as aforesaid, it shall deliver the respective notice in writing to the Prefect of the Department where the land is situated.

(...)

Article XX

The Government grants to the Company the exclusive privilege to establish, administer and enjoy, during the same term of the inter-oceanic route, a telegraph line between the two terminus ports of the same route, either submerged across the Lake, or built around it. The Company shall fix the general tariff of the telegraphic line, but the Government of the Republic shall only charge half of the price established, with the understanding that the telegraph shall be considered an accessory work of the company of the inter-oceanic route that the Company shall establish.

(...)

Article XXII

Upon expiration of the term of twenty-five years of the present contract, the Government of the Republic shall take possession of the inter-oceanic route, including all the works and property dedicated to its service, as well as the telegraph line and steamers, without being obligated to pay any compensation, and all the effects of the present contract shall terminate on that same date.

THE GOVERNMENT:

Having read and examined the foregoing contract entered into between the Plenipotentiary Minister of this Republic in Washington, D. Luis Molina, by virtue of his competent powers, and the Central American Transit Company; and found in full compliance with the instructions given to this effect, and ratified by the same Company,

RESOLVES:

1. The said contract is approved in each and every part. Consequently, pass to the Legislative Assembly for its ratification.

Done at Managua on the twentieth of January of 1864. Tomás Martínez (L. S.) The Minister of Foreign Affairs. Pedro Zeledón (L. S.)

Art. 2. The pre-inserted contract shall be considered a law of the Republic after the act of exchange of the ratifications has taken place.

Done at the Sessions Hall of the Chamber of the Senate. Managua, February 15, 1864. Vicente Quadra, P. S. Macario Alvarez, S. S. – Cleto Mayorga, S. S. – To the P. S. – Hall of the Chamber of Deputies. – Managua, February 17, 1864. – J. Guerrero, D. P. – Ramón Alegría, D. S. Jerónimo Pérez, D. S. – Therefore: Execute. – National Palace – Managua, February 18, 1864. – Tomas Martínez. The Secretary of Home Affairs – Rosalío Cortéz.

ACT OF EXCHANGE

In the city of Managua of the Republic of Nicaragua, on the twentieth day of February of one thousand eight hundred and sixty-four, gathered at the National Palace in the Department of Home Affairs, H. E. Mr. Rosalío Cortéz, acting Minister of Foreign Affairs, and Colonel J. C. Woods, Special Commissioner of the Central American Transit Company, acting in the name and on behalf of this Company, vested with ample and special powers, with the objective of proceeding to the exchange and execution of the Transit Contract, entered into on the tenth of November of 1863, and ratified and approved on the 18th instant by the Legislative Assembly; and upon having communicated to each other their respective Full Powers, found in good and proper form, the original copies of the contract were compared and found to be of the same tenor, the exchange was made, and H. E. Mr. Rosarío Cortéz, acting Minister of Foreign Affairs, received a copy in Spanish signed by the named Colonel Woods, Special Commissioner of the referred Company, placing in the hands of the same Mr. Woods another copy in Spanish signed by the same Minister of Foreign Affairs. And this act is recorded in Spanish and we sign in duplicate, earmarking one copy for the Republic of Nicaragua and another for the Company, on the date and place stipulated hereinabove.

(Signed) Rosalío Cortez (Signed) J. C. Woods, Commissioner

Therefore:

DECREE:

Consider it a law of the Republic, and print and published as corresponds.

Done at Managua, on the 20th of February of 1864.

Tomás Martínez
The Secretary of Foreign Affairs
Rosalío Cortéz

Done at Managua, February 20, 1864.

Annex 19

F. A. PELLAS NAVIGATION CONTRACT. MANAGUA, 1 MARCH 1877

MINISTRY OF TRADE.

Decree of March 16th ratifying the steam navigation contract

The President of the Republic makes known to its inhabitants:

That Congress has ordered the following:

The Senate and the Chamber of Deputies of the Republic of Nicaragua

DECREE:

Sole Article. The contract concerning steam navigation in the internal waters of the Republic, entered into on the first of this month between the Supreme Government and Mr. Francisco Alfredo Pellas, is ratified, which literally reads as follows: "Anselmo H. Rivas, Minister of Trade of the Supreme Government of Nicaragua, especially commissioned to enter into a contract concerning navigation in the internal waters of the Republic with Mr. Francisco Alfredo Pellas, a resident of Granada and the assignee of the contract entered into with Mr. J. E. Hollembeck and partners on the eighteenth of February of one thousand eight hundred and seventy, have agreed upon the following provisions:

The Government of Nicaragua grants to Mr. F. A. Pellas, partners and heirs, the exclusive privilege, for an eighteen year period, to navigate with steamboats the San Juan del Norte river and Lake Granada [lake Nicaragua] and transporting through them the fruits of the land as well as merchandise destined to the Republic's interior, reserving for herself [Nicaragua] the right to contract any other company and for the time that the Government decides, for the re-establishment of inter-oceanic transport, without hindering the rights granted under the present Contract. The Republic make express reservation of the right to make a new one.

(...)

9. The Company obligates to stop each month, with its steamer in the lake, at the ports of Granada, La Virgen and San Ubaldo, or at the ports that may be designated as more convenient for trade in the departments of Rivas and Chontales. However, considering that the coast of Rivas is more dangerous during the summer months, the Company is authorized to make those trips with its Schooner from November to April, until the pier at San Jorge is completed, except when the Government requests the steamer to make a visit to said department.

THE GOVERNMENT:

Having embraced the preceding contract entered into with Messrs. John E. Hollembeck and partners on 18 February 1870, and transferred to Messrs. F. A. Pellas and partners.

RESOLVES:

Sole article. The foregoing contract is approved, leaving the previous [contract] of February 18, 1870, without effect, and to submit it to the constitutional ratification of the Legislative. Managua, March 5, 1877. Chamorro. Minister of Trade. Rivas.

Done at the Sessions Hall of the Chamber of the Senate. Managua, March 13, 1877. I. Maliaño, S. V. P. Isidoro López, S. V. S. José Gregorio Cuadra, S. S. To the Executive. Sessions Hall of the Chamber of Deputies. Managua, March 14, 1877. Francisco Reyes, D. P. Francisco del Castillo, D. S. Agustín Duarte, D. S. Therefore: Execute. Managua, March 16, 1877. Pedro J. Chamorro. Minister of Trade. A. H. Rivas.

Annex 20

CÁRDENAS-MENOCAL CONTRACT. MANAGUA, 23 MARCH 1887

APPENDIX I

1877-03-23.

CONCESSION AND DECRESS OF THE REPUBLIC OF NICARAGUA TO THE NICARAGUA CANAL ASSOCIATION OF NEW YORK.

The President of the Republic to the inhabitants thereof:

Knowing that Congress has ordered as follows:

The Senate and chamber of deputies of the Republic of Nicaragua do Hereby decree—

ONLY ARTICLE. - The Contract for a maritime interoceanic canal entered into the 23d pf march, ult., between. Dr. Adan Cárdenas, commissioned especially by the supreme Government, and Mr. A. G. Menocal, member and representative of the Nicaragua canal association organized in New York, is hereby ratified. This contract shall be a law of the Republic if Mr. Menocal accepts it as soon as he be notified witch the following modifications and upon the followings terms:

The undersigned, Adan Cardenas, commissioner of the Government of the Republic, party of the first part, and Aniceto Menocal, representative of the Nicaragua canal Association, party of the second part, both having sufficient power have entered into the following contract for the excavation of an interoceanic canal trough the territory of Nicaragua.

Article I

The Republic of Nicaragua the aforesaid Nicaragua Canal Association and Mr. A. G. Menocal, representative of the said association, accepts on its behalf for the purpose set forth in article 7, the exclusive privilege to excavate and operate maritime canal across its territory, between the Atlantic and Pacific Oceans.

Article II

The canal shall be of sufficient dimensions for the free and commodious passage of vessels of the same size as the large steamers used for ocean navigation in Europe and America, provided that no locks used in said work shall be less than five hundred and fifty (550) feet in length and thirty feet in dept.

Article III

The State declares this work to be of public utility.

Article IV

The donation of the present privilege shall be for ninety-nine (99) years, to be counted from the day the canal shall be opened in universal traffic. During the along the aforesaid period the company shall have the right to construct and operate railway along the waole extent of the canal, or those parts of the same that may be considered convenient for the better service and operations of the said work.

Article V

The Estate binds itself not to make any subsequent concession for the opening of a canal between the two oceans during the term of the present concession, and also to abstain from granting a concession for a railroad, such as might compete with the canal for the transportation of merchandise, during the same period; but nothing in this article shall prevent to Government of Nicaragua from constructing or permitting the construction of such railway, as it may deem advisable for commerce and internal traffic. Said Government also to have the right to construct or permit the construction of an interoaceanic railway if in course of time it be demonstrated that the canal is not sufficient to satisfy the demands of the traffic all nations.

The grantee company shall have the right to establish such telegraph lines as it may deem necessary for the construction, management, and operation of the canal. The Government shall have-the right to occupy these lines for the public service without any remuneration to the company.

Article VI

The Government of the Republic declares, during the term of this concession the ports at each extremity of the canal, and the canal itself, from sea to be neutral, and that consequently the transit trough the canal in case of war between two powers or between one or more and Nicaragua shall not be interrupted such cause; and that merchant vessels and individuals of all nations of the world may freely enter the ports and pass trough the canal without molestation or detention.

In general, all vessels may pass through the canal freely, without distinction, exclusion, or preference of persons or nationality, provident they pay the dues and observe the regulations established by the granted company for the use of the said canal and independencies. The transits of foreign troops and vessels of war will be subjected to the prescriptions relating to the same established by treaties between Nicaragua and other powers or by international law.- but entrance to the canal will be rigorously prohibited to vessels or war of such powers as may be at war with Nicaragua or with any other of the Central American Republics.

Nicaragua will endeavors to obtain from the powers that are to guarantee the neutrally that in the treaties that shall be made for that purpose they shall agree also to guarantee zone of lands parallel to the canal and also maritime zone in both oceans, the dimensions of which will be determined in such treaties.

(....)

Article XLVI

In view of the existence of an exclusive privilege granted by the Republic in favor to Mr. P. Alf. Pellas, by a contract ratified on the 16th. Of March 1877 for the navigation by steam on the lake and river for the purpose s of the internal commerce of the republic the canal company shall have the right of expropriation against Mr. Pellas as regard his rights and properties, on just assessments by experts after making a corresponding compensation according to the law of the Republic.

It is also stipulated that the company binds itself to pay government of the republic all it may from now on expend in any way for the improvement of the navigation of the river and the port of San Juan del Norte. This payment shall be made within six months of the date of the beginning of the works of the canal, and according to the original accounts of the corresponding office.

(....)

Done in the hall of sessions of the chamber of deputie- Managua, April 20, 1887.

-Tomas Armijo, P.- Luis E. Saenz, Secretary- Leopoldo M. Mor
Secretary- to the Executive Power- hall of the of the Senate- Manag
23, 1887.-Joaquin Zavala, P. A. H. Rivas, S. - Eliodoro Riv
Therefore: be it executed. National Palace- Managua, April 24, 1
Carazo –the under secretary of the interior in charge of the office-A
Canton.-Accepted on the same date.-Canton.- A. G. Menocal.

Annex 21

NOTE FROM LEWIS CASS, SECRETARY OF STATE OF THE UNITED STATES, TO WILLIAM CAREY JONES, SPECIAL AGENT OF THE UNITED STATES TO CENTRAL AMERICA. WASHINGTON, 30 JULY 1857

1081

Lewis Cass, Secretary of State of the United States, to William Carey Jones, Special Agent of the United States to Central America[1]

WASHINGTON, *July 30, 1857.*

SIR: Reports have reached here, which I trust however are not correct, that the Government of Costa Rica has formed projects of aggrandizement, and intends to appropriate to itself portions of the Territory of Nicaragua, thus converting the war which has just been terminated by the accomplishment of the object for which it was avowedly undertaken into a scheme for territorial acquisition. Such a design is so unjust in itself, in view of the circumstances, and so inconsistent with the public declarations of the Government of Costa Rica, when directing its forces, to march into Nicaragua, that the President is unwilling to believe the project is seriously meditated. Still the reports are of such a character as to render it proper you should communicate freely with the Governments of Costa Rica and Nicaragua on the subject. The question itself presents grave considerations, not only for them, but for all the other independent States of this continent, whose position and relations render the prosperity of each a subject of general interest to all of them.

You will bring to the recollection of the Government of Costa Rica the various circumstances which appeal forcibly to her sense of justice, against the project now imputed to her. Her own good faith is in the way of it. She would violate the solemn pledges given when she proposed to go to the aid of Nicaragua by attempting to convert this into a war of conquest. It may not be useless to refer to some of the public declarations which were made upon this subject in order to secure cooperation both in Nicaragua and elsewhere. Among these is the proclamation of the President of Costa Rica of March 1st 1856, in which it is said that "Ours is not a fight for a piece of land —not to secure ephemeral powers—not to achieve a wretched conquest," &c. And again in another proclamation of the same President of March 7th., he announces, that he will "command in person the expeditionary army about to march in pursuit of the freebooters, now attempting to usurp the territory and the independence and liberties of the Central American States," and appointing D. Francisco Marie Oreamuno Vice President to exercise the supreme Executive power during his absence.

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[1] Special Missions, vol. 3.

And these declarations are in conformity with the act of the National Congress of the Republic of Costa Rica which announced by its decree of February 26th. 1856, that the object of the war "is to protect the inhabitants of Nicaragua against the ominous oppression of the freebooters, and to drive them from the face of the soil of Central America."

And the same purpose was avowed in the proclamation issued by President Mora the 28th. February two days after the above decree was passed.

More solemn pledges of the objects of a State and of the line of policy to be adopted in their attainment, with a view to propitiate public opinion and to secure coöperation in a hazardous enterprise could not be given. They have passed into history and they cannot be violated with impunity. It would be a manifest breach of good faith to convert a war thus undertaken to defend a Sister State from "bandits", and possession thus acquired into a territorial conquest, and permanent occupation. An injustice of this kind might again light up the flames of war in Central America and postpone indefinitely the pacification of the country.

The people of the United States cannot be indifferent to the progress and prosperity of the Central American States, with which they are destined to have an important and mutually beneficial intercourse. It is the hope of the President that the political troubles which have so long harassed them, will be now brought to a conclusion and that a free and stable government and a wise course of administration will enable each of them to enter upon a career of improvement, which they have so many motives to pursue, and where they have so beautiful a region for all their exertions. But this hope will prove vain if they yield to a spirit of conquest and exhaust their energies in hostile efforts against each other instead of directing them to the peaceful advancement of their true interests.

Reference was made in your instructions [1] to the controversy, which has so long been pending, between Nicaragua and Costa Rica respecting their boundary. It is a question, with which the United States have no direct interest, except so far as it may affect the route from Ocean to Ocean by the San Juan River. There are peaceable and honorable modes of adjusting it far better than by a resort to force. And each of the parties has in turn proposed thus to arrange it, but from circumstances, comparatively trivial the propositions have heretofore failed. It is the opinion of the President that these parties ought to be restored to the state they were in when the war commenced, and he recommends that they then have recourse to the mode pointed out in the sixth article of the Clayton-Bulwer treaty for the settlement of all their differences. Experience must have satisfied them, that the time has come, when a mutual arrangement can be no longer safely delayed. If the course thus recommended be adopted and a spirit of good will prevails, those States will remove every cause of dissension existing between them and secure their future friendly relations so necessary to the prosperity of both.

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[1] See instruction dated May 15, 1857, above, this part, doc. 1080.

The progress of events has rendered the inter-oceanic routes across the narrow portions of the American Continent a question of great importance to the commercial world, and especially to the United States, whose possessions extending along the Atlantic and Pacific coasts demand the speediest and easiest modes of communication. The magnitude of the subject it is even now difficult to appreciate, and from year to year it is destined to increase in interest. While the just rights of sovereignty of the States, occupying this region should always be respected, we shall expect that they will be exercised in a spirit befitting the occasion and the new circumstances that have arisen. No Government can close these gates of intercourse on the great highways of nations, and justify itself by saying they belong to us and we have the right to shut them. Such a pretension would not be tolerated. It is equally the interest and the policy of all these States to encourage the opening and the use of the transit routes, and to protect them against vexatious delays and interruptions. With the concurrence of the respective governments, a large foreign capital has been embarked in these enterprises, and of this the citizens of the United States have contributed their full proportion. Under these circumstances any efforts to interrupt the transit or to interfere with the rights of our citizens would be considered an unfriendly act by this government. While the United States are sensible that for the reasons already referred to, their interest in this great question is more important than that of any other Power yet they seek no peculiar privilege whatever. All they desire is that these routes be kept open and uninterrupted for the commerce and intercourse of all nations alike. And the President indulges the hope, that they may yet be considered by general consent as neutral highways for the world, not to be disturbed by the operations of war.

Considerations connected with this subject, independently of those already adverted to, would render a scheme of conquest by Costa Rica very unacceptable to the United States.

The transit grants which were made by Nicaragua were made when she was in full possession of the territory which they embrace, and they cannot be affected now by any forcible seizure of this territory on the part of Costa Rica. It is not believed that such a pretension will be asserted, but since the grants have been heretofore disapproved by that State, its authorities may be strongly urged, if a change of occupancy should occur to set them wholly aside, and repudiate all the rights to which they have given rise. It is proper, therefore, that the subject should engage your attention. I do not understand that Costa Rica has ever claimed jurisdiction over the San Juan river but only the territory on its right bank, and the right of enjoying its navigation. How far her pretensions now extend and whether they have been increased by the events of the war, are not known here. There can be no reasonable objections to a mutual arrangement by which the free navigation of the river, shall be secured to her citizens, leaving the jurisdiction over it to Nicaragua. But this government would see with reluctance the establishment and occupation by Costa Rica of military positions along the river, by which its navigation might be liable to interruption whenever the two States should be embroiled in disputes. We have reason to believe that measures have already been taken with a view to such military occupation, and if you ascertain that such is the fact you will remonstrate with the Government of Costa Rica and present for its consideration the views herein urged.

An equitable adjustment of the conflicting claims, of these two States might easily be arranged without subjecting the route of communication to different jurisdictions. It is desirable, that each of the inter-oceanic routes should pass through the territory of a single State, thus avoiding those jealousies and collisions which would be sure to arise from a political partition. Where therefore this object is already obtained by actual possession and by the exercise of jurisdiction, the territorial condition should not be disturbed, but under the most imperious circumstances. None such exist in this case, and you will make known to the authorities of Costa Rica the confident expectation of the United States, that the possession of the territory, over which the line of communication passes, will be left to Nicaragua. Keeping this object in view, the President will be gratified to learn, that the long continued controversy between Nicaragua and Costa Rica, concerning their boundary, has been amicably and satisfactorily adjusted.

I am, Sir, Your obedient servant [etc.].

Annex 22

NOTE FROM COLONEL JORGE CAUTY, DIPLOMATIC REPRESENTATIVE OF THE COSTA RICAN GOVERNMENT, TO MR. SEGUNDO CUAREZMA, COMMANDER OF THE SAN CARLOS FORT.
SAN CARLOS, 14 OCTOBER 1857

October 14, 1857

To Don Segundo Cuaresma, Commander of the Fort of San Carlos

Dear Sir,

By order of the General Headquarters of Costa Rica, I have been ordered to proceed immediately to demand that you surrender the custody of the Fort of San Carlos to the Costa Rican force under my command; and if it is not surrendered, to blockade it until it is reduced by hunger.

Since the instructions of my Government in this matter are to avoid in every way possible any Central American bloodshed and to treat the garrison and neighboring towns with all consideration, I invite you to come to consult with me under a pledge of honor and safe conduct to avoid the inconveniences and pains of a blockade, which I am prepared to maintain until the end.

It is necessary to note that the intentions of my Government in this matter is the better custody of this position against the dangers of filibusterism, and the regulation of some political affairs upon which depend the commercial interests of the whole of Central America, which the Government of Nicaragua cannot sufficiently guarantee. If you surrender, I offer you all the honors, as well as the necessary time for your justification and honor with safe conduct to wherever you wish to go with your entire garrison.

With the highest respect and consideration, I remain your obedient servant.

To know who this gentleman Cauty was, it is
letter addressed by Mr. Carey to the Secretary of State.

Punta Arenas del Pacífico
September 19, 1857

To General Lewis Cass
Secretary of State
Washington

Sir:

……………………………………………………………

The person alluded is Mr. Cauty, an Englishm
and has pushed for the Webster contract of transit. H
the Army of Costa Rica and in charge of the lower
River. He participated in the capture of the River and

……………………………………………………………

Very respectfully, sir, your obedient servant.

Wm. Car

(Signed)
Jorge J. Cauty"

necessary to read the

man who is interested
His son is a colonel in
part of the San Juan
of the lake steamships.

ey Jones

Annex 23

NOTE FROM WILLIAM CAREY JONES, SPECIAL AGENT TO THE UNITED STATES TO CENTRAL AMERICA, TO GREGORIO JUÁREZ, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA. MANAGUA, 17 OCTOBER 1857

1402

William Carey Jones, Special Agent of the United States to Central America, to Gregorio Juárez, Minister of Foreign Affairs of Nicaragua [1]

MANAGUA, *October 17, 1857.*

SIR: The letter which you were pleased to direct to me under date of yesterday,[2] came opportunely to my hands. I am gratified at the expressions of confidence & good will which it contains, and especially with the assurance that the authorities of this Republic will co-operate in those matters which concern it that I am charged with on the part of the United States of the North. For the friendly offer in respect of other matters that I have in charge I am very thankful, & shall avail myself of it.

I have already had the satisfaction to write to the Department at Washington of the nature & character of the provisional authority existing in Nicaragua, and the approaching installation of a government based on a constitutional election.

This I first communicated in letters of the 27th ult from San Jorje [Jorge].[3] Subsequently; with more confidence, because of fuller information, in letters from Granada of the 2nd inst,[4] and recently in letters from this Capital, I have not hesitated to assure the Department at Washington of a peaceful result to the elections that have taken place, and the institution in pursuance of them, of a government that shall combine the qualities of fact and law. That this information will be well and pleasurably received by the government and people of the United States I should be warranted in saying, from knowledge of the sentiments of those authorities and of my fellow-citizens in common towards the Republics of this continent.

Happily I am able to give you further assurance in this respect. In the

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[1] Special Agents, vol. 20, enclosed with Jones to the Secretary of State, November 2, 1857, below, this part, doc. 1406.

[2] Above, this part, doc. 1401.

[3] No pertinent despatch of September 27, 1831 to the Secretary of State was found; but see the one of September 28, 1857 from the same place, above, this part, doc. 1396.

[4] Above, this part, doc. 1397.

letters which the Department of State at Washington has been pleased to direct to me I am constantly instructed that the United States, desiring in all respects the prosperity and happiness of the States of Central America, have an especial desire that they shall establish and maintain solid governments.

You will know therefore that it was very agreeable to me to make the communications which I found apt to the domestic politics of this State. As to the exterior, the government of the United States will know with regret that the question of limits between Nicaragua and Costa Rica remains open; & with still more regret that the government of Costa Rica holds, and shows an intent to hold, positions on the river San Juan and Lake Nicaragua which may affect the exclusive jurisdiction that belongs to Nicaragua on that line of interoceanic transit.

It is the opinion of the government of the United States that the government of Costa Rica in inaugurating the war of which Nicaragua was lately the scene, precluded its-self by its public declarations from any territorial acquisitions or advantages in the result of it; and that therefore if the two States still differ as to a divisory line, the position in which they were anterior to the war ought to be restored, both in respect of fact and law, that is, leaving the Republic of Nicaragua in the exclusive jurisdiction of the transit. It is further the opinion of the United States that the route by way of the river San Juan and Lake Nicaragua ought to be under a *sole* jurisdiction, and that that jurisdiction ought to remain with the State which, in full possession of it, heretofore granted the use of it.

In this view, I am instructed to "remonstrate" with the government of Costa Rica in the event that it shall come to my knowledge that that State proposes to avail itself of the casualities of the war to hold territory or military positions not before in its possession, and which may make the interoceanic communication liable to interruption.

Further, I am directed, in that case, to bring to the mind of that government the declarations of disinterestedness by which it made its justification in the opening of hostilities with a view to propitiate the sympathy & procure the co-operation of these States.

The United States observe as a rule non-interference with questions exterior to their limits. But with regard to the Republics of this continent they necessarily feel an especial interest, as having themselves made the example of renouncing the control of a metropolis in the other hemisphere, and establishing republican instead of monarchical institutions in the new world.

This sentiment of sympathy and friendship might sometimes and with propriety, induce them to proffer as between contending States on this continent their good officies, though the questions at issue should not, beyond that friendly regard, have an interest for them. But in the present case the United States, have an especial interest; first in respect of the duty which the government owes to its citizens, who have entered into lawful contracts, and invested time, money, and labor in the inter-oceanic passage refered to.

Secondly, in respect of their peculiar positions as embracing communities that border on both oceans, but with an immense non-populated district of country between them, and therefore requiring for their political, commercial, and social intercourse the use of those parts of the continent that offer easy communication from one to the other sea. And third, as one of the great maratime and commercial nations, concerned in the freedom of the seas and the non-interruption of the routes between them.

The United States have the opinion therefore that they may with entire respect to the States of Nicaragua and Costa Rica, present themselves in the pending question and even to say that they would regard as an act unfriendly to them any measure that should look to keeping the transit out of use, or, in case of its being opened, to make it liable to interruption.

And in this category will be classed by the United States, whatever attempt on the part of the government of Costa Rica to take jurisdiction of, or occupy militarily, the river San Juan, the Lake of Nicaragua or any part of said route.

I am glad to know through your very acceptable note that the Republic of Nicaragua has not the intention, from any real, or supposed pressure of circumstances, to abandon the immense advantage that the possession of that route affords; hence, that the friendly recognition which the government of the United States accords to the ancient jurisdiction and sovereignity of Nicaragua in that entire line will not be forfeited for want of firmness on the part of this Republic.

In respect of this subject, I am instructed by the Department at Washington to "communicate freely" with the governments of Costa Rica & Nicaragua, and I am warranted in saying that the United States will not willingly see the jurisdiction of the route of transit divided, nor any control over it, or interference with it, exercised by more than one sovereignty.

Beyond this, the United States do not propose to make any suggestion as to what line, or on what terms these coterminous States shall compose the questions between them.

"Keeping in view," as I am instructed, a sole jurisdiction of the transit, the government at Washington will be glad to know of an arrangement by the concurrence of the two States, without extra-territorial intervention; and any arrangement thus mutually made which shall, as before set forth, preserve intact the transit, will have the cordial good will of the United States, and, as far as they are concerned, need not prevent the accordance of the free navigation of the river to the citizens of Costa Rica. I am further instructed however, and this is a point that I approach with delicacy; that the time has come when in one mode or another, the whole question ought to be resolved.

The prosperous advancement of the two Republics, Nicarag
Rica, requires it; and the positions and interests of the United
hardly beyond reason in me to say, render it for them imperat

The convention for that object which was made on the 6th
the special commissioners of Nicaragua and Costa Rica, (bu
concluded) is known to me. In view of the relations that it w
tion of the government of the United States I should have with
ties of these Republics, their friends and neighbors, it will not b
express an opinion as to the precise limits that ought to be acce
two States, nor to say more in that particular than I am speciall
namely, that pending a final settlement the Statu-quo ought t
and the settlement its-self to provide for a jurisdiction intact o

On this latter point I am confident that the Honorable Mini
is my privilege to address, will pardon me for the suggestion t
vention alluded to is hardly as clear, as in a complete arrangem
desirable.

With that point made unequivocal, should the two contra
agree on the terms of that convention, no other State would
or a disposition to interpose, and the honorable gentleman and
(General Cañas) to whom Costa Rica had the sagacity to subm
tiation on her part may have the consciousness that he has not
to his country.

In case a mutual arrangement cannot be speedily made I a
to suggest that the mode of arrangement mentioned in the si
the treaty concluded 9th of April 1850, between the govern
United States and that of Great Britain, known as the Clayt
treaty be resorted to. The friendly offices which, as I learn b
mable note, have been invited by this government from that o
will I trust supercede the necessity of looking to the mediation of
removed.

In either event, the friendship and good will of the United St
the States of Central America and the fixedness of the upright
judgement which they have formed in the case directly in co
may be relied on. It will give me much satisfaction if it shoul
me to co-operate with the representative which the State of G
any other of the States of Central America may empower to a
pending question; and it would be with pain that I should com
the government at Washington that internal negotiations had f

If the views of the United States as they are above express
any service in procuring a speedy solution of the question, t
have been to a good purpose.

It will be interesting to the government of the United States
informed of the advices which this government may have of th

desires or views of that of Costa Rica in respect of the river San Juan, the Lake, and the land transit; and I respectfully request of you the favor to communicate to me on this subject.

Permit me Sir, to subscribe myself with all respect [etc.].

Annex 24

NOTE FROM PEDRO RÓMULO NEGRETE, MINISTER PLENIPOTENTIARY OF THE GOVERNMENT OF EL SALVADOR, TO GREGORIO JUÁREZ, SECRETARY FOR FOREIGN AFFAIRS OF NICARAGUA, 6 MAY 1858

Farewell of Mr. Negrete

LEGATION OF SALVADOR NEAR THE GOVERNMENTS OF NICARAGUA AND COSTA RICA.

To the Honorable DON GREGORIO JUÁREZ,
Secretary of State at the Ministry of Foreign Affairs
of the Republic of Nicaragua

SIR, Having been signed at San Jose, Costa Rica, the important treaty of peace and limits between this and that Republic, which was concluded in the city of Rivas on April 26th last, according to the act of exchange of that date, the undersigned Plenipotentiary of El Salvador has the pleasure to inform you that he has just arrived to this Court to cordially greet the Government of Nicaragua, and to congratulate it for the conclusion of the serious questions that existed with Costa Rica and to announce the withdrawal of this Legation to the capital of El Salvador to inform its Government of the successful result achieved by the undersigned Minister of that Republic in those of Nicaragua and Costa Rica. In saying farewell, I am very pleased to state in this note that my heart vehemently wishes that the present social wellbeing of the Nicaraguans, the internal and external policy of its Government, and its well-founded hopes for improvement in all senses shall consolidate each day more and more and shall soon become a reality. El Salvador happy if it contemplates a great and prosperous Nicaragua! May the Supreme Legislator of societies illuminate the majestic Assembly that is sleeplessly working on the political constitution of this Republic! May the Divine Providence be prodigious in providing the assistance that the Government needs to better direct the peoples whose fate it has entrusted! These votes for Nicaragua shall always be made by El Salvador, its brother and defender.

This Legation, recognizing the attentions, gifts and honors it has received from the Government and people of Nicaragua, also consigns here its highest gratitude and fervent desires that the Government shall always find a powerful support in its people, and the people a paternal administration in the Government, as is seen today in Nicaragua with pleasure in Central America and with satisfaction in the world.

Animated by these desires, the Minister of the Republic of El Salvador bids farewell to the Honorable Mr. Juárez, reiterating the highest esteem he is worthy from his very attentive and very obedient servant.

PEDRO R. NEGRETE

Annex 25

NOTE FROM MIRABEAU B. LAMAR, UNITED STATES MINISTER RESIDENT TO NICARAGUA AND COSTA RICA, TO LEWIS CASS, SECRETARY OF STATE OF THE UNITED STATES.

MANAGUA, 28 MAY 1858

1436

Mirabeau B. Lamar, United States Minister Resident to Nicaragua and Costa Rica, to Lewis Cass, Secretary of State of the United States [2]

[EXTRACT]

No. 10 MANAGUA, NICARAGUA, *May 28, 1858.*

SIR: . . . During the same interview (the 26th inst.) a lengthy discussion took place in the presence of the Belgian Minister upon some points of the Treaty and upon the importance of its immediate ratification; but I could

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[1] The omitted portion refers to two enclosures. Neither these, nor those mentioned in the following sentence giving details of the Kinney expedition, have been considered of sufficient importance to include in this publication. The treaty, improperly so-called referred to herein, is merely a pledge by Kinney and his men not to return to Greytown, "except with peaceable and friendly intentions, etc."

[2] Despatches, Nicaragua & Costa Rica (Central America), vol. 3. Received June 28.

The two omitted portions of this despatch relate to his commission as minister resident and to claims.

get nothing out of the Secretary upon the subject, except that certain amendments and modifications had been forwarded to Mr. Buchanan and that as soon as Mr. Buchanan's answer was received—which, he said, would be in about eight days,—the Government would then be able to speak more definitely about its fate.

In a previous conversation with the same Minister Cortés, he asked—why were the Americans so anxious to enter Nicaragua as filibusters, while they are invited, under liberal colonization laws, to come as friends? I answered that there was no protection for my countrymen when they came under such invitation; for, at any moment that the Government or influential individuals became offended with, or jealous of them, they were liable to be persecuted, shot, or banished, and have their property confiscated. Under the garantees of a Treaty they would come as peaceful and industrious citizens, and all would be well; but there being no Treaty, there is no safety and they must either keep out of the country, or come into it with arms in their hands for their own protection. He made no reply.

In my despatch, dated 28th April 1858,[1] I mentioned that President Martinez had proceeded to Rivas to meet there President Mora, of Costa Rica, for the purpose of settling the question of Boundary between the two Republics. On the return of the President to Managua, the acting minister of Foreign Affairs addressed me a note (Nº 1º)[2] enclosing a copy of the official Gazette, which, he said, would inform me of the happy results of the interview between the two Presidents at Rivas. I send herewith a copy of said Gazette and also my note—(Nº 2º)[3]—in reply to the Minister's. You will find in the Gazette a Treaty of limits between the two Republics, by which it appears that Nicaragua has conceded all that Costa Rica demanded and probably more than she ever expected to obtain. Under this Treaty Costa Rica now claims all Guanacaste, and the right bank of the San Juan, from three miles below Old Castillo, to the mouth of the river, including Punta Arenas. This concession was made as an inducement to Costa Rica to enter into another Treaty of alliance defensive and offensive against the Filibusters. Besides these two treaties, a triple convention was concluded between said Republics and Salvador, for the same avowed purpose. It is expected by these Governments that the two other States of Central America—Guatemala and Honduras—will soon unite in similar alliance. These treaties have not been published; they are only alluded to in the Editorials of the Official Gazette. All this is done—as it is said here—for the purpose of presenting a formidable front against "the common ennemy";—and who is meant by the common ennemy will be readily comprehended by reference to President Martines's late violent proclamation, which I forwarded with my last despatches.

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[1] Above, this part, doc. 1432.

[2] See note 2, p. 675, above, this part.

[3] For the text of his reply, which was dated May 15, 1858, see above, this part, doc. 1434.

Mr. Belly—the Frenchman alluded to in a former dispatch—came with President Mora, and Negrete, the Salvador Commissioner, to Rivas; and without doubt exerted considerable influence in the negociation which took place there. I am credibly informed that he publicly denounced the Irisarri Treaty in Costa-Rica, and spoke violently against the American people and of their desires of aggression upon Central America. He has been here several times but I have never seen him. He has confined himself to confidential communication with the Government, and no one seems to know for what purpose. The general understanding is that he is in secret negociation for a right or charter to construct a rail-road from San Juan del Norte to some point of the Pacific—and this I think is probably true; in as much as some of the members of the National Assembly have been enquiring whether the United States would permit such an enterprise, or not. The idea is a popular one;—not from any desire for public improvement but on account of the hope which it inspires that a work of that kind constructed with french capital, and french labor; and owned and controlled by frenchmen would lead to the building up of a french power in this country which would be able to keep the Americans in subordination. Such are the hopes and desire of those who control the destiny of this nation. I do not suppose that said Belly has promised them any thing in the name of his Government; but I am certain that there prevails in this country a strong impression that France and England, as soon as they can have a pretext for so doing, will unite with Nicaragua and all Central America in a war against the United States. The nation is looking forward to this event; and the strong belief that it will sooner or later take place, has much to do in shaping the present policy and measures of this Government.[1]

The Belgium Plenipoteniary—Mr. Kint—arived here about three weeks ago, and has just concluded a Treaty with this Government. He has negociated similar treaties with all the Central American States, except Costa Rica; whither he will go in a few days for the same purpose. He is a gentleman well adapted to his mission, as he combines fine address and amiable temper with extensive knowledge, experience and considerable talents. He was in Guatemala at the time our Cass and Irisarri Treaty was discussed by that Government. He tells me that it met with severe opposition for a while; but the authorities finally recommended Nicaragua to ratify it without any amendments, or modifications. . . .

I have the honor [etc.].

Annex 26

NOTE FROM LORENZO MONTÚFAR, MINISTER OF FOREIGN AFFAIRS OF COSTA RICA, TO ANSELMO H. RIVAS, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA. SAN JOSÉ, 22 JULY 1872

Remarks of the Government of Costa Rica in refutation of the doubts expressed by the Government of Nicaragua regarding the validity of the Treaty of Limits

SAN JOSE, July 22, 1872.

SIR: I have received the letter that Your Excellency was good enough to send me on June 30.

In that letter, Your Excellency states there has been no intention to incite an immediate boundary resolution, but to expose what the Government of Nicaragua considers to be an unlawful act by an employee of this Republic.

Your Excellency continues to repeat the same that has been stated already to support the opinion of those who believe that the treaty of limits is illegal; you insist that the so-called "Desaguadero" in the royal decree of Aranjuez is not the San Juan; you affirm that various royal decrees, geographers and tradition show there are differences between one and the other; you state that the grant of grace made by the King of Spain was to conquer the territory indicated in the royal decree and that nobody will dare to assert that it was conquered; and you conclude by asking for a forthright explanation with respect to the conduct of the Chief of the guard posts.

Your Excellency will allow me to say that in your letter of May 22 you did not limit yourself to the question of the guard posts; you went beyond that; you stated that the *status quo* should be observed while the validity or invalidity of the treaty of 15 April 1858 was resolved. You added that said *status quo* should be understood as follows: Nicaragua exercises free navigation in the Colorado and uses all the points and places ceded to Costa Rica by virtue of the treaty of limits.

So the *status quo*, according to Your Excellency, is that Nicaragua possesses all of it as the absolute owner and lord.

Your Excellency expresses in that same letter that after the validity of the treaty has been admitted, it would be necessary to practice measurements, and you conclude by stating that Nicaragua had granted to Costa Rica vast territories contiguous to the right bank of the San Juan River.

In the presence of these concepts, it was necessary to say everything that is stated in the note of June 10.

Even in this letter I cannot limit myself to the question of the guard posts because Your Excellency does not limit himself to it since he insists on the boundary question and invalidity of the treaty of April 15, 1858.

By virtue thereof, allow me to say, Sir, that historian Juarros describes the boundaries of the District of Nicoya as follows:

"It is bound to the West by the Mayoralty or Alcaldía Mayor of Subtiava; to the South, by the Pacific Ocean; to the North, by Lake Nicaragua; and to the East, it extends along the borders of Costa Rica."

The same is stated by Alcedo in his Dictionary published in 1788.

The illustrious Don Francisco de Paula García Peláez asserts in his memoirs that the kingdom had five governments: Guatemala, Nicaragua, Costa Rica, Honduras and Soconuzco; and nine Alcaldías Mayores, to wit: San Salvador, Chiapas, Tegucigalpa, Sonsonate, Verapaz, Suchitepéquez, Nicoya, Amatique and Mines of Zaragoza.

In the well-known account of the Kingdom of Guatemala made by engineer Don Luis Diaz de Navarro in 1754, these words are found: "On January 19, 1744, I arrived to the mountain of Nicaragua, which is a very rough mountain, where the province of said name ends at the place I have explained in my first trip, and I entered the jurisdiction of Nicoya, which even though it is an Alcaldía Mayor separated from the Government of Costa Rica, it is considered a part of said province." Thereafter, the same author adds: "The capital of said province (Costa Rica) is the city of Cartago; its boundaries and jurisdiction are: in the northern sea, from the mouths of the San Juan River to the Shield of Veraguas of the Kingdom of Tierra Firme."

The La Flor River was the dividing line between Subtiava and Nicoya, as shown by the land titles and by the practices established in the respective administrations since immemorial times.

Three years after Independence, Nicaragua was suffering the scourge of a civil war because of the disagreements between Leon and Granada and Managua and Masaya that so much afflicted her.

Costa Rica, on the contrary, was established in absolute peace and tranquility.

The district of Nicoya did not want to run the fate of Nicaragua, agitated by discord, but to definitively belong to Costa Rica.

Costa Rica accepted this decision in 1825 with the approval of the Federal Congress.

When the Central American Union was dissolved, each State preserved the boundaries it had at that time, and this is the *uti possidetis* principle on which they rest today.

Consequently, Nicoya formed an integral part of Costa Rica until 1858 when the treaty of limits was signed.

By virtue of this treaty, Costa Rica separated from the La Flor River and withdrew to the Bay of Salinas.

The line that is guaranteed to Costa Rica by the treaty is insured by a possession of many years.

Further, in the division of the foreign debt, Costa Rica was given the part that corresponded to the territory I am talking about.

Costa Rica also recognized the part of the colonial internal debt that corresponded to that territory.

The royal decree of Aranjuez fixes the boundaries of Costa Rica from the mouth of the Desaguadero up to Veraguas.

Your Excellency says that the San Juan River is not what is called "Desaguadero" in the cited royal decree.

In my letter of June 10, I had the honor to state to Your Excellency the following:

"It is very important for the nations to fix their boundaries with the foreign, and the dividing lines between their provinces. For such purpose, it is sought, whenever possible, mountain ranges, rivers, lakes and seas as boundaries. In the Council of the King of Spain, this notorious truth was taken into account and the most remarkable and natural dividing line possible was fixed as the boundary between Costa Rica and Nicaragua: the San Juan River.

Nothing has been answered by Your Excellency with respect to this remark.

According to historian Juarros, the south bank of the San Juan was considered part of Costa Rica, which shows that what was called the Desaguadero is the San Juan.

The ancient names of the rivers on this side that fall into the San Juan confirm this same statement.

The river immediately next to the Old Castle is called "River of Costa Rica" in the ancient charts.

To maintain that the Desaguadero is not the San Juan, Your Excellency talks about decrees, geographers and tradition.

Your Excellency will allow me to say that neither those decrees nor those geographers have been presented to date.

Your Excellency knows very well that traditions are based on an enchainment of competent writers who, in a series of uninterrupted years or centuries, present facts as true, which attests to an absolute uniformity of beliefs.

I do not know that series of writers who accredit the tradition that Your Excellency refers to and those I have cited not only show that there is no absolute uniformity of beliefs in favor of the thesis maintained by Your Excellency, but that these beliefs have a completely different meaning.

Your Excellency says that the concession made by the King of Spain to Artieda Chirinos was conditioned to his conquering all the territory mentioned in the decree of Aranjuez.

Mr. Minister, before Artieda Chirinos, Pedrarias had already conquered that territory. The conquest was continued by Artieda and concluded by his successors. It is so stated by one of the aforementioned writers, citing "Décadas" by Herrera and other writers.

So, even if the rights of Artieda were conditioned, the condition was fulfilled.

Further, Costa Rica issued its fundamental law in 1825.

In said law (article 15), it fixed the mouth of the San Juan as the boundary with Nicaragua.

The neighboring Republic did not make any claim.

The Congress of Central America accepted the Costa Rican Constitution, and the Federal Authorities respected it until the pact of unity was dissolved in 1839.

The treaty of limits is objected by stating that the Constituent Congresses do not ratify treaties: therefore, the Constituent Assembly of Nicaragua that ratified our treaty acted as an ordinary Congress: that under such concept, it could not alter the fundamental laws of Nicaragua with respect to its boundaries.

Mr. Minister, this argument is only worth analyzing because it is presented by a person who has just been Minister of Foreign Affairs of Nicaragua: Licenciate Don Tomás Ayón.

The Congresses or Assemblies are the branch that has the power to enact laws.

There are two types of laws: fundamental and secondary.

The set of fundamental laws is called Constitution.

The collection of secondary laws is called common law, and said collections receive various names, according to the category to which they belong.

The Constitution is the basis and foundation of the common laws.

More power and authority is needed to enact fundamental laws than to enact secondary laws.

Constituent Assemblies are the supreme legislative branch.

Not only can they enact fundamental laws, but also secondary laws, for which they need less power.

The various Constituent Courts of Spain are manifest proof of this notorious truth.

The Constituent Assembly of France not only decreed the principles and the basis of the Constitution in 1789, but also abolished the tithes and offerings, enacted provisions against the nobility and issued other decrees of secondary order.

Fundamental and secondary laws have also been enacted by other Assemblies that the French people had.

The English Parliament, an ordinary legislative branch, also has the faculty to amend laws of fundamental order, which is tantamount to investing the legislative and constituent branch.

It cannot be objected that the ratification of treaties in England corresponds to the Crown because said ratification does not suffice when the English laws are amended by a treaty.

The treaty of Utrecht between England and France did not take effect because the English Parliament refused to approve a bill that was submitted to ratify the amendments that said treaty introduced in the laws of commerce and navigation.

In England, treaties are also submitted to Parliament if Great Britain is obliged to give any amount of money.

Without leaving the Central American sphere, we see that the Constituents enact secondary laws and ratify public treaties.

The treaty entered into between Costa Rica and Guatemala on March 10, 1848, was ratified in that Republic by a Constituent Assembly and, nevertheless, none of our publicists ever said that that treaty was null because constituent bodies cannot ratify public treaties.

Mr. Ayón, in his capacity as Minister of Foreign Affairs of Nicaragua, addressed a letter to the Secretariat under my charge, dated August 20, 1870, requesting that the Constituent Congress of this Republic ratify certain amendments in a treaty.

So, Mr. Ayón, in his capacity as Minister of State, believes that Constituent Congresses can ratify treaties, and, in his capacity as a publicist, asserts that they do not have such faculty.

Constituent Congresses that enact fundamental laws, which are the most important, also enact secondary laws, which are the least important.

Constituent Congresses only lack power to enact secondary laws when the call states very clearly and definitively that their only faculty is to decree the Constitution.

So people elect their representatives for that purpose, and only for that purpose.

But the Constituent of Nicaragua that ratified the treaty of limits was not only called to enact the fundamental law, as former Minister Ayón tells us in his pamphlet of June 10 of this year.

Moreover, if this Assembly can only enact fundamental laws, it could ratify the treaty of limits, according to the doctrines held by the Ministry of Foreign Affairs of Nicaragua.

Your Excellency affirms that the provisions regarding boundaries pertain to the category of fundamental laws; so then a Constituent Assembly could ratify the treaty because the constituent authority enacts fundamental laws.

The subtle distinction made by former Minister Ayón with respect to the Constituent of Nicaragua that ratified the treaty as an ordinary Assembly and not as a Constituent Authority, cannot satisfy anyone.

Said Assembly invests power to the august constituent authority, the first of all the government branches, that it never delegates nor could delegate, and all its acts should be considered to be executed in that high capacity.

Mr. Minister: I think it is useless, entirely useless, to officially continue this discussion because there is no Authority to settle the controversy.

If an Arbitration Tribunal existed to which the matter could have been submitted, it would be a good idea to make extensive allegations before it; but there is none, nor the Republic of Nicaragua has deemed appropriate to propose it.

It is useless to say and confirm that the treaty of limits was entered into by competently authorized Plenipotentiaries, that it was approved by the Governments of Costa Rica and Nicaragua, that it was ratified by the Congress of Costa Rica and by the Constituent Assembly of Nicaragua, that it was exchanged, that it was solemnly published as a boundary law, and that it has been enforced for fourteen consecutive years, during which time the Congresses of Nicaragua have used it as a basis for their deliberations. All of this is useless because, as stated to our Minister in Managua by General Zavala, a person competently authorized by the Government of Your Excellency to discuss this matter, the treaty is objected not because of a lack of indispensable formalities for its validity, but because it is believed that it injures Nicaragua.

That statement by General Zavala has been confirmed by the press of Nicaragua, which has even stated that the nullity of grievous treaties has prevailed in all the nations when they have been able to make it prevail: that Napoleon III annulled the treaties of 1815: that Germany tore up the treaty whereby Richelieu was snatching up Alsacia and Lorraine: that Russia has asked to be declared exempt from the obligations acquired in the treaty of Paris, and that one day Austria will tear up the Villafranca treaty.

Mr. Minister, if I proposed to myself to start analyzing this question, I would show that neither Napoleon III, nor Germany, nor any of the nations cited have said "we do not respect that treaty because it injures us; we do not respect it because we were forced to sign it."

What has happened many times is that when societies and the interests of the nations are modified, pre-existing conventions are also modified by mutual consent and even by force, but Costa Rica and Nicaragua do not find themselves in this situation.

In my letter of June 10, I had the pleasure to say that Costa Rica was not an overwhelming Power for Nicaragua when the treaty was signed: that it was a friendly nation, a sister nation that had gone to assist her during its independence war, and had aided her against an enemy who issued decrees of slavery and death in that soil.

The terrible discords between Leon and Granada and the bloody fights between the parties that were called legitimist and democratic brought the filibuster invasion to Nicaragua.

When the neighboring Republic was invaded, Costa Ricans shed their blood and expended their wealth to save Nicaragua from foreign domination.

Costa Rica seized the steamers in the Lake and in the San Juan River: triumphantly took its flag to Punta de Castilla; impeded the incursion of the filibusters through the great river course, thus putting an end to the exterminating war that afflicted Nicaragua.

Sir, if Your Excellency will allow me to say, I do not understand how these acts of redemption can become today an accusation against Costa Rica and a basis for declaring the nullity of a treaty, the groundlessness of which will undoubtedly bring new disasters upon two bordering and fraternal peoples.

* * * * * *

Mr. Minister, the enunciated concepts are definitive, very definitive. They express that the guard posts should be deemed authorized for the foregoing and only for the foregoing.

For this reason, the conduct of those guard posts shall be approved by the Government of Costa Rica, when it is circumscribed to the provisions set forth in the pre-inserted paragraph, and disapproved when it extends beyond the provisions contained in the aforesaid paragraph.

The practice of the Nations and publicists shows us that free navigation of the rivers is obtained through conventions granted by the States whose territory they cross.

Free navigation in the Rhine was obtained through treaties.

Free navigation in the Escalda was obtained through treaties at the end of the past century.

Free navigation in the Elbe, Po, Danube, Mississippi, San Lorenzo, Plata and Amazon was obtained through treaties.

This universal practice has been the guiding principle of Costa Rica with respect to free navigation over the Colorado, motivated by a greater reason. This greater reason is that the Colorado River is located in its entire extension on Costa Rican territory.

With respect to this type of river, all publicists agree that the State to which they belong can legislate in respect thereof as corresponds to their interests.

Costa Rica, adopting the most liberal idea possible, established in article 12 of the Constitution that foreigners can exercise their industry and commerce, own real estate, purchase and transfer property, navigate the rivers and freely exercise their religion.

According to this concept, Nicaraguans can navigate the Colorado, and have no limitations other than those prescribed in the tax laws, so as to prevent contraband.

Those tax laws are limited to what I stated in my letter of June 10, and to what I have repeated in this letter, and do not extend beyond that.

So that the interests of Costa Rica do not suffer; so that Nicaragua does not suffer any damage; so that free navigation of the river is not interrupted; it would be convenient to devise a means that is conducive to a common agreement.

His Excellency the First Commissioner Designated will be pleased to hear those proposed by the Government of Nicaragua because he desires to reach a peaceful and friendly settlement.

I believe that the Government of Your Excellency will be animated by the same sentiments, and with this assurance, I have the honor to remain, Sir, your most dutiful servant.

LORENZO MONTÚFAR

To H. E. the Minister of Foreign Affairs of the
Republic of Nicaragua

Annex 27

MESSAGE OF TOMAS AYÓN, STATE DEPARTMENT OF NICARAGUA, TO THE SENATE OF NICARAGUA, GIVING HISTORY OF THE BOUNDARY NEGOTIATION WITH COSTA RICA. MANAGUA, 8 JANUARY 1876

APPENDIX "D."

Message of the State Department of Nicaragua to the Senate of Nicaragua, giving History of the Boundary Negotiations with Costa Rica.

SECRETARYSHIP OF FOREIGN AFFAIRS OF THE
GOVERNMENT OF NICARAGUA,
MANAGUA, *January 8, 1876.*

To the Honorable SECRETARIES OF THE SENATE:

GENTLEMEN: I have the honor to send to you the correspondence between this Cabinet and that of Costa Rica about the boundary questions and the invalidity of the treaty of the 15th of April, 1858.

You will observe that the Cabinet of Costa Rica refuses to acknowledge the duties that were imposed upon that Government by the treaty of the 30th of July, 1868; not only denies the existence, fully authenticated, of the rights of Nicaragua, but also refuses to accept the only means of solving this difficulty—an impartial arbitration.

And as injustice is always accompanied by an absurdity, that Cabinet argues in defense of its position the very question that is in dispute, that is to say, that the territory in question belongs to Costa Rica. In that way the Government of Costa Rica assumes the extraordinary faculty of defining its own rights in the matter and imposing upon Nicaragua the obligation of acknowledging them, without taking into consideration the friendly ties that exist between the two countries, which have been guaranteed by an international convention, and in so doing places both Republics in a violent and strained position.

In order to establish its pretended sovereignty over the territory in question, that Government argues that the people of Guanacaste (Nicoya) voluntarily united with Costa Rica, and besides that, the same territory was annexed to it by a resolution of the Federal Congress of Central America. It is convenient in this connection to bring to memory some historical facts.

After the independence of the Kingdom of Guatemala, the District of Nicoya remained united to Nicaragua, and this was admitted by Costa Rica for in her Constitution of the 21st of January, 1825, she established as the limit between the two States the River del "Salto." This is a fact that cannot be disputed.

The pernicious influence of the old employés of the Spanish Government and the inexperience of the political parties formed in the first days of the Republic, placed Nicaragua in disastrous anarchy. Under such unpleasant circumstances the first Central American Congress met. Costa Rica sent to it her deputies. Nicaragua could not do so. The representatives of Costa Rica taking advantage of this opportunity, solicited the annexation of Guanacaste to their State; but the Congress, acknowledging the misfortunes under which Nicaragua was laboring, did not receive the above proposition with much favor, and it simply declared by decree of the 9th of December, 1825, that said district would remain under the rule of Costa Rica until the demarkation of the territories of the States was made. The request of Costa Rica and the resolution of the Congress demonstrated that at the time of the independence, Guanacaste did not belong to Costa Rica.

This provisional state of things established by the Congress was legally altered. The assembly of Nicaragua met in 1826. Nicoya, acknowledging its old mother country, joined with the District of Nicaragua (now the Department of Rivas) in the election of a deputy, according to the decree of the 5th of May, 1824. Neither Costa Rica nor the Federal Congress expressed any disapprobation of this act. One of the first resolutions of the assembly was to protest before the Congress against the provisional annexation of Nicoya. Costa Rica then endeavored to make the district accept her Constitution, but the people refused to do so in a declaration dated the 15th of August, 1826, arguing that the annexation had been only provisional, and that the protest of the assembly to the resolution of the Federal Congress was pending; also protesting against the annexation.

The civil war, which had not completely ceased at that time, received new impulse in the years 1827 and 1828, and in the year 1829 three of the five States united to make war against the National Government, resulting in the change of the administration, but not securing the quietude that the stability of the country needed. The constant state of disturbance in which Central America remained was the reason why the Congress could not dictate any resolution about the limits of the States—a measure which, under the circumstances, undoubtedly would have complicated the situation still more. In the meantime Costa Rica, favored by public disturbances, was in possession of Nicoya, and still is in possession of this territory, comforted that the moderation with which Nicaragua has always treated this unpleasant affair is a guarantee to her.

With this object, and by order of the President of the Republic, I beg you to place the present before the Honorable Chamber with all the documents that accompany it, so that it will be pleased to mark to the Government the conduct that must be followed in this affair.

I have the honor to subscribe myself your most obedient servant,

TOMAS AYON.

Annex 28

NOTE FROM MR. FRANCISCO CASTELLÓN, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, TO MR. ASCENSIÓN ESQUIVEL, MINISTER OF FOREIGN AFFAIRS OF COSTA RICA. MANAGUA, 5 JUNE 1886

Mr. Minister:

Through the Official Gazette of that Republic, my Government has been informed of three regulations established by that of Your Excellency, which alter the situation admitted by the two States with respect to the territories and waters of the San Juan and Colorado, which is dealt with, in part, by a long-standing boundary question that regrettably has existed between both countries.

The first of these regulations establishes a Control Post that will reside at the mouth of the Colorado River, and will be dependent on the Office of the General Inspector of the Treasury. The second puts a national steamboat at the disposal of said control post and points out its attributions, among others, to "travel", at least once a week, the San Juan, Colorado, Sarapiquí and San Carlos rivers, the first in its entire extension where it is navigable for Costa Rica, the second in all its extension, and the last two along the whole stretch that is navigable by steamboat." The third mandates to establish a settlement on the left bank of the Colorado River, with the name of Irazu, and "authorizes" the occupation and cultivation of the wastelands that belong to the Republic, situated on the right of the San Juan River, downstream from the mouth of the San Carlos;" qualifies the mouth of the Colorado as a minor port, and establishes its franchise with regard to a considerable list of articles destined for different uses.

Having this Government challenged the validity of the Treaty of Limits of 1858, on which authority Costa Rica could support rights to the waters and territories to which such regulations refer; and having admitted the status quo of the question, it cannot be expected that either of the two parties will take any action that somehow modify it and make it appear as resolving it by itself.

Even assuming the validity of the Treaty of Limits, which this Government has not admitted, I must draw your attention to the circumstance that the government's disposition that a national steamer navigate the waters of the San Juan authorizes an act not granted by [the

1858] treaty, which in Article 6 reserves for this Republic, exclusively, the dominion and sovereignty over its waters, conceding to Costa Rica nothing more than free navigation with articles of trade.

The President, desiring that the annoying question does not arise again, which now more than ever could have terrible consequences for both nations, which are called to a common destiny and threatened by identical dangers, and that a disagreement does not extend which could hinder the development of the interests of one and the other Republic in the disputed territories, has instructed me to propose to Your Excellency's Government that the question concerning the validity of the 1858 Treaty be submitted to the arbitration of any of the Presidents of the Republics of the United States of America, Mexico, Chile or Argentina, thereby acting in conformity with the stipulations of article 2 of the Treaty of June 30, 1868.

Meanwhile, my Government claims, in the name of the friendship and positive interest of Nicaragua and Costa Rica, that [the Government] of Your Excellency suspend the execution of the regulations that have motivated this note, in order to avoid a repetition of the discussion which, without leading until now to a satisfactory solution, could taint the harmony between the two States.

Assuring Your Excellency that my Government would happily accept the arbitral award, whatever might be its nature, I am pleased to reiterate the assurances of my consideration and respect, and I remain at your service.

[S] – F. Castellon

His Excellency

The Minister of Foreign Affairs of the Republic of Costa Rica – San Jose.

Annex 29

NOTE FROM MR. ASCENSIÓN ESQUIVEL, MINISTER
OF FOREIGN AFFAIRS OF COSTA RICA,
TO MR. FRANCISCO CASTELLÓN, MINISTER
OF FOREIGN AFFAIRS OF NICARAGUA.
SAN JOSÉ, 31 OCTOBER 1886

Mr. Minister:

On this date I have the honor of addressing to Your Excellency the following telegram. 'The Government of Guatemala, desirous of finding a good solution to the pending difficulties between this and that Republic, offers its good offices to mediate. The Minster of Guatemala has informed me that he has addressed a letter to Your Excellency expressing the same thought. My Government accepts that friendly offer, and if that of Your Excellency has the same view, I beg you to let me know, if it is acceptable to you, that the negotiations be transferred to Guatemala. I consider it is advantageous, for the two Republics, that the question be further discussed before a mediating Government, because that way its good offices would undoubtedly be more efficient. Since our ordinary communications are somewhat slow, I would greatly appreciate if you send me your reply by telegraph. I remain, Sir, with all consideration, your obedient servant. ASENSION ESQUIVEL."

I am pleased to state that my Government confirms the terms in which that telegram was conceived, and that it will be pleasure if [the Government] of that Republic deigns to give its consent to the friendly proposal of the President of Guatemala, and to the objective of transferring the negotiations to the mediating Government.

My Government observes with regret that a solution has not been reached for the pending difficulties between this and that Republic, and as an example of the good understanding that should prevail between them, has hastened to embrace with utmost frankness the offer of good offices promised to both.

It will be satisfactory for my Government that [the Government] of Your Excellency, animated by the same sentiments, is willing to contribute with its good will to the disappearance of all reasons of disagreement that could alter the harmony in which both Republics are called to live.

I reiterate, Sir, the assurances of my most distinguished consideration and I remain your obedient servant.

[S.] – Asension Esquivel

His Excellency

Minister of Foreign Affairs of the Republic of Nicaragua. – Managua.

Annex 30

NOTE FROM MR. JOSÉ J. RODRÍGUEZ, MINISTER OF FOREIGN AFFAIRS OF COSTA RICA, TO MR. FRANCISCO CASTELLÓN, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA. SAN JOSÉ, 11 NOVEMBER 1886

Mr. Minister:

In a timely manner this Secretariat received Your Excellency's note, dated October 18 last, in which you explain the observations that you presented on August 2 against the contents of a letter that Mr. Peralta, Minister of Costa Rica in Washington, addressed to Judge Daly, in relation to the rights that correspond to Costa Rica in the canal that is projected to be opened through the waters of the San Juan River.

I have carefully examined the arguments and the interpretation that Your Excellency makes against the concepts of Mr. Peralta's letter, and I consider that Your Excellency does not distort the explanations and arguments with which this Secretariat supported the contents of Mr. Peralta's letter, in a note of August 19th of this year.

Your Excellency seems to find in the concepts of Mr. Peralta new pretensions by Costa Rica, or exaggeration of the rights it holds with respect to the San Juan River, but I think Your Excellency will be convinced that there are no new pretensions on the part of Costa Rica with respect to the San Juan River, considering that, in the aforesaid note of August 19, upon beginning to explain the words used by Mr. Peralta in his letter to Judge Daly, this Secretariat stated that the Government of Costa Rica "does not pretend to have today more territorial rights on the side of Nicaragua than those conferred to it by the treaty of April 15, 1858, which validity it argues, and that, as long as this convention is not invalidated, it shall regulate our participation in the canal. The part that may appertain to Costa Rica in the enterprise, cannot be fixed beforehand with mathematical precision; it will increase or decrease according to the direction that the line follows; but to determine this, it is necessary to take into account the Costa Rican territory that the canal or its accessories will occupy, and the rights that Costa Rica will waive in favor of the company, or due to the canal".

After this explanation by this Secretariat, I believe there is no reason to find new questions between Costa Rica and Nicaragua in Mr. Peralta's letter; and that the only one pending between these two Republics, is

reduced to the validity of the treaty of April 15, 1858, provoked by the Government of Your Excellency, and that, according to the agreement of both governments, will be submitted to arbitration.

This is the reply that, according to the instructions of the President of the Republic, I have the honor to give to Your Excellency's note, to which I referred at the beginning, and I take this opportunity to remain, Sir, your obedient servant.

(S.) – *Jose J. Rodriguez*

His Excellency

Minister of Foreign Affairs of the Republic of Nicaragua. - Managua

SECRETARIAT OF FOREIGN AFFAIRS

Annex 31

NOTE FROM MR. JOAQUÍN ELIZONDO, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, TO MR. CLETO VIQUEZ, MINISTER OF FOREIGN AFFAIRS OF COSTA RICA.

MANAGUA, 14 FEBRUARY 1887

Dear Minister:

With special instructions from the President, I have the honor to call your attention to a very serious matter that has drawn, not without sufficient reason, that of the people and Government of Nicaragua.

It has become known, through reliable reports, that many days ago a Costa Rican engineer arrived at the point known as "Los Chiles", accompanied by some individuals: who is performing land measurements from that point up to Machuca, a place called "El Infierno," and opening paths and roads along the way, which, given the knowledge of that deserted zone, cannot be but strategic; and, moreover, when Costa Rican troops have arrived at the same place "Los Chiles".

The decision of the Government of Costa Rica last year to establish a customs post at the mouth of the Colorado River, as a dependence of the General Inspection Unit of the Ministry of Finance; to make available to said customs post a national steamship to carry out reconnaissance at least once a week on the San Juan, Colorado and Sarapiquí rivers; and to establish a village on the left bank of the second of these rivers to be named Irazú, was precisely the cause that rekindled the old border issue between the two Governments and the debate acquired such proportions that it seemed to close the door to a peaceful outcome. It was this aspect of the debate which led the President of Guatemala to offer his mediation, which after long debates, in which the Minister Plenipotentiary of Costa Rica did not seem as conciliating as expected, led to the signing on 24 December of a Convention at the capital of that Republic, which shall bind the two Contracting Parties, once it has been ratified, to submit to arbitration the question regarding the validity or nullity of the Treaty of Limits signed in 1858, for which they have appointed the President of the United States of America as arbitrator.

Having placed the difficulty in that position of civilizing expectation, it could not be assumed, judging the issue on the basis of the principles that are accepted by an educated people to govern their reciprocal

relations, that neither of the two contracting parties would take any step, before the question was defined through the agreed means, that could alter the conditions in which it was at the time I have indicated.

For all these reasons, the Government finds it is very strange that while it has withdrawn the troops that reinforced the garrisons of San Carlos and El Castillo, remaining there only a foot of peace, and at the time that Convention was approved, the Government of Costa Rica suddenly assumed the singular attitude in which it appears placed by the facts that given origin to this letter because, according to the spirit of the alluded Convention, as long as it is not ratified by the Congresses of the two Republics, the Government of Costa Rica does not have any right to exercise jurisdictional acts, that is valid due to the imminent sovereignty that Nicaragua exercises in the same territory, which does not correspond to that Republic. And, one of two propositions: either that Executive branch is prepared to carry forward the Arbitration Convention, or it is not willing to approve it. If the former, then it should not have altered in any way, much less as it has just done, the conditions of the matter when the question arose last June, and above all, after the mediation was accepted, and as a result, its arbitration; and if the latter, the good faith that the Government of Nicaragua has shown in this matter, as in all, the right to wait for that Republic to choose, in such event, the open road of frankness, and categorically and publicly deny its approval to that document.

I promise, Mr. Minister, that in view of the seriousness of the circumstances and the powerful reasons that I express herein, you will give me an explanation that clearly defines the intentions of the Government of that Republic regarding the current status of the boundary question by virtue of the respective convention, so that Nicaragua may understand the conduct that it should follow in relation to the same matter, in compliance with its most ineludible obligations to the Nation. And whatever these intentions may be, the President wishes that I demand, as I of course do, from the government of Costa Rica, as soon as possible, to cease the military engineering works, and to retire from the right bank of the San Juan River the troops to which I alluded at the beginning of this letter, so that no obstacle may hinder the Arbitration Convention from producing its legal results.

I sincerely hope that nothing will alter the cordial relations of friendship between Nicaragua and Costa Rica, and I am pleased to reiterate to Your Excellency the assurances of my distinguished consideration and remain at your service.

The Minister in charge of the Foreign Affairs Office.

(Signed) Joaquin Elizondo

His Excellency

Minister of Foreign Affairs of the Republic of Costa Rica
San José

Annex 32

NOTE FROM MR. CLETO GONZÁLEZ VIQUEZ, MINISTRY OF FOREIGN AFFAIRS OF COSTA RICA, TO MR. JOAQUÍN ELIZONDO, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA. SAN JOSÉ, 21 MARCH 1887

National Palace

Excellency:

I have the honor to reply to your Note of February 14th last, in which, with special instructions from the President of that Republic, you call the attention of my Government to a matter to which Your Excellency attributes manifest seriousness.

It refers to the fact that a Costa Rican engineer arrived some days ago to the point called "Los Chiles", accompanied by some individuals, took measurements from that point up to Machuca, place called "El Infiernito", and was opening paths and roads in that trajectory, which in the opinion of Your Excellency cannot be but strategic, given the knowledge about that deserted zone. You also say that Costa Rican troops have arrived at "Los Chiles".

With such motives, Your Excellency recalls the fiscal provisions issued by my Government last year concerning navigation on the Colorado and the establishment of settlements at the Sarapiquí and at the mouth of the river, which originated the discussion regarding the right to do so; and you conclude by requiring my Government so that, as soon as it is possible, it order to cease those military engineering works and to withdraw from the right bank of the San Juan river the troops alluded to in your letter.

I must confess to your Excellency that the tone of the note I am replying to, caused deep surprise to my Government because its conduct has not been incorrect, nor could have produced just alarm in Nicaragua; and I consider that the instructions that were followed by Your Excellency when addressing this Secretariat, were only the fruit of the momentary anger caused by erroneous perceptions and false statements by misinformed people. My Government, far from desiring new difficulties to ensue between the two republics, it is ready, and it has thus shown, to accept all peaceful and conciliatory means to end those pending, and has not moved away at all from its traditional custom of strictly complying with the commitments it makes. It of course rejects the reproaches made by Your Excellency, and I am encouraged by the hope that Your Excellency will change opinion as I explain the facts so crookedly interpreted that reached the ears of that Government.

No military troop has been sent to "Los Chiles", or to any other point close to the Nicaraguan territory. There has been no need to do so: total peace has reigned in all the territories of the country, and there is no reason to think that Nicaragua pretends to be hostile towards us now that prudent negotiations have put past disagreements on the path to a peaceful arrangement.

Before Your Excellency's note arrived at this Secretariat, my Government did not know what points had been crossed by the Costa Rican engineer. But having left with the objective of fulfilling an official task near that zone, it is not unusual that he may have touched from "Los Chiles" up to the Machucha. I cannot believe that he would carry out jurisdictional acts outside of our territory; neither can I conceive the reason why Nicaragua would consider itself aggravated by acts that are carried out beyond the scope of its right. But if I put myself in the situation where an official commission actually touched Nicaraguan land, which would have occurred without due authorization or perhaps out of ignorance or imperious need, it would still be natural to expect tranquil tolerance on the part of that Government. Peace reigns between the two nations, and these just an instant ago ran to fortify, through a reciprocal agreement, the friendly and fraternal ties that unite them.

But it is inferred from Your Excellency's narration that the charge made to my Government is based on the belief that Mr. Alpizar was appointed to carry out a reconnaissance of strategic points. There has been no such appointment. Your Excellency knows the wealth of the fertile region of the Sarapiquí, San Carlos and Frio river; does not ignore perhaps the movement that has been recently introduced in these places by the roads that private individuals and the Government are building; he should recall that navigation on the San Juan provides an easy and safe way for smugglers to import merchandise from the port of San Juan del Norte to points of our territory, from where they can then be taken to the interior of the country, and that this traffic has been undermining for a long time our tax revenues.

So then, the Government is interested in exploring that valuable zone. It wants to sponsor the movement that has started there and, if possible, to conveniently open it to the workers who request it. On the other hand, has the duty to avoid the defalcation of customs duties derived from smuggling, to impede the illegal exportation of natural products from those regions and to object to the undue importation that often takes place by those means. It is true that the Government commissioned Mr. Alpizar, through the Ministry of Finance, to carry out a reconnaissance not of the strategic points, but rather of the points which are more accessible for smuggling and of the zone in general, on the one hand, to facilitate industrial activity and, on the other hand, to establish customs posts at those locations which provide greater confidence to smugglers.

That is all. The Minister of War has not participated in the work of the commission. It was Finance that caused the measurement, gave instructions and was first interested in its performance.

Neither the accompaniment of Mr. Alpizar should have caused distrust. Consisting of few people, I do not see how another character other than peaceful could have been attributed to it.

The Arbitration Convention has obtained the approval of the Executive branch and there is no reason to fear that Congress will reject it. This indicates how far we are willing to calmly wait for the award of the arbitrator; in other words, to accept a decision that could be adverse to us, in exchange for maintaining a cordial understanding between the two countries and their respective governments. It is not credible, therefore, at this moment, to think about introducing distrusts that destroy the good harmony in which we live with Nicaragua.

Speaking of the Convention, I bring to memory the words of Your Excellency which entail a charge against Licentiate Ascension Esquivel, our Plenipotentiary. Your Excellency says that he did not seem, in the long conferences that prepared the pact, as conciliatory as would have been expected. I think Your Excellency has not been well informed. Proof of this is the Convention itself, which if not conceived to sacrifice Costa Rica, does not cause detriment to the interests of Nicaragua. Licentiate Esquivel was sent to defend ours and fulfilled his duty.

The previous explanations render useless, now that it is time to just wait serenely, all discussion about whether Costa Rica has the right or not to explore and recognize, if only militarily, the zone to which Your Excellency has referred. It is known that my Government has been upholding ever since the question concerning the validity or lack of validity of the Treaty of 1858 arose, that the terms of this should be considered as the definition of the status quo, until the controversy is resolved; that the dispute that exists between Costa Rica and Nicaragua does not refer to limits, but to the

validity of the treaty; and until it is not declared null, Costa Rica, as well as Nicaragua, have the perfect right to exercise any kind of sovereignty over the territories that the Convention attributes to them, which affirmations are not contradicted neither by the letter nor the spirit of the Arbitration Convention. Moreover, although my Government has no reason today to think otherwise, I repeat that such dispute is for the time being, if not sterile, inopportune, because the good understanding that we have recently reached puts upon us the duty of not agitating the moods with angry discussions, and waiting with tranquility the final solution that is forthcoming. This is what my Government thinks, and this is what seems to me well founded.

The fact that the President was absent from the capital, on a far trip to the south of the republic, precluded an immediate reply to Your Excellency's note.

With sentiments of high consideration, I remain your obedient servant.

(Signed)

Cleto Gonzalez Víquez

His Excellency

Minister of Foreign Affairs of Nicaragua.

Annex 33

NOTE FROM MR. PEDRO PÉREZ ZELEDÓN, CHIEF OF THE COSTA RICAN LEGATION IN WASHINGTON, TO MR. THOMAS F. BAYARD, SECRETARY OF STATE OF THE UNITED STATES OF AMERICA, 30 JULY 1887

LEGATION DE COSTA RICA,

SIR: I have the honor to enclose a copy of the treaty signed at the city of Guatemala on the 24th of December, 1886, by plenipotentiaries of Costa Rica and Nicaragua with the friendly mediation of the Guatemalan Government, in which it was stipulated that both contracting parties should submit to the arbitration of the President of the United States of America the question whether the treaty of limits celebrated by them on the 15th of April, 1858, is or is not valid.

In the name and under special instructions of the Government of Costa Rica I request you to interpose your good and valuable offices with His Excellency the President in order that he may consent to render to my country the eminent service above referred to.

My Government hopes that such a marked favor will be obtained by it, and grounds its expectations upon the benevolent friendship shown to it by your Government and on the traditional interest that this great nation has always felt for the peace, tranquillity, and welfare of the other nations of America which are its sisters.

With protestations of my highest consideration, I am, your most obedient servant,

PEDRO PEREZ Z.

To the Honorable THOMAS F. BAYARD,

Secretary of State,

Annex 34

TELEGRAM FROM MR. PEDRO GONZÁLEZ, UNDER SECRETARY FOR HOME AFFAIRS, TO MR. ASCENSIÓN ESQUIVEL, MINISTER OF FOREIGN AFFAIRS OF COSTA RICA, 28 SEPTEMBER 1887

Sir Minister: With I suffer I deeply regret to inform H. E ; that Treaty Carazo - Soto has not deserved the approval of the Congress, and that this one has closed today its extraordinary meeting.

With distinguished consideration, I am of kind H.E servant.

The Undersecretary of Interior in charge of the Office. (f) Pedro González

Annex 35

NOTE FROM MR. PEDRO PÉREZ ZELEDÓN, CHIEF OF THE COSTA RICAN LEGATION IN WASHINGTON, TO MR. THOMAS F. BAYARD, SECRETARY OF STATE OF THE UNITED STATES OF AMERICA, 23 MARCH 1888

Legation of Costa Rica

Washington, March 23, 1888

Sir:

I have had the honor to receive your Excellency's letter, dated yesterday, by which you inform me that His Excellency, the President of the United States, has announced his ruling in the question concerning the validity of the Treaty of Limits entered into by the Republics of Costa Rica and Nicaragua with regard to the other points of interpretation submitted and that Your Excellency has fixed the day of tomorrow, at twelve noon, to deliver to each of the representatives of the parties the document that contains the arbitral award.

It is highly satisfactory, for my Government and for me, the news that a question that for so many years has disturbed the tranquility of my country and that of the Republic of Nicaragua, its neighbor and sister; and at the appropriate time I will express to His Excellency the President the profound gratitude to which the Republic of Costa Rica is indebted for the eminent service it has received from him.

I shall go punctually at the time of the appointment to receive from Your Excellency's hands the arbitral award.

I reiterate, Sir, the assurances of my highest esteem and adhesion.

Pedro Perez Z.

His Excellency Mr. T. F. Bayard
Secretary of State

Annex 36

NOTE FROM MR. PEDRO PÉREZ ZELEDÓN, MINISTER OF FOREIGN AFFAIRS OF COSTA RICA, TO MR. JOAQUÍN ELIZONDO, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA. SAN JOSÉ, 25 SEPTEMBER 1888

Secretariat of Foreign Affairs

Minister:

By conduct of the distinguished diplomatic representative of this Republic before this Government, General Isidro Urtecho, I have had the honor to receive Your Excellency's appreciated letter dated in Managua on the first of this month.

In that letter, Your Excellency manifests to this Secretariat that he has received the three copies of the Canal Contract mentioned in the telegram that I sent you on August 9th last.

Your Excellency further adds that by replying to that telegram, you also express the satisfaction of your Government in light of the hope it had that with said contract mine contributed to provide facilities for the accomplishment of an enterprise, in which the future of these countries is linked; and that Your Excellency had nothing to observe about the contract, which on the contrary was a source of great pleasure for Your Excellency, if it did not entail serious difficulties for the execution of the Canal work, and did not imply the assumption of Nicaragua's ownership rights that invalidates the contract and makes it totally ineffective.

In support of these assertions, Your Excellency calls the attention of my Government to clause 11 of the Award issued by the President of the United States, where it declares that the Treaty of Limits of 1858 does not give Costa Rica the right to be a party to grants which Nicaragua may make for inter-oceanic canals, therefore, Costa Rica cannot intervene in a matter in which only Nicaragua is a party, without flagrantly breaching the arbitral award.

That affirmation is corroborated, according to Your Excellency, by the fact that the Canal Association is a creation of this Republic, by the concessions and privileges it has received from it; and Your Excellency states that this fact shows that Costa Rica could not enter into an agreement with the Canal Company without first seeking the consent of Nicaragua.

Your Excellency also calls the attention of my Government to the circumstance that the aforesaid contract contains clauses that seriously injure the rights of Nicaragua, among others, the stipulation in article XLVIII, which grants to Costa Rica property rights in the Canal, which only correspond to Nicaragua by virtue of the dominion and sovereign jurisdiction it has over the territory and waters in which said work will be executed.

Your Excellency warns, however, that if after the definitive trace of the Canal becomes known, it were indispensable to use any part of the territory or waters of Costa Rica, in that case Your Excellency's Government would find it natural for Costa Rica to seek the indemnity to which it would be entitled.

Your Excellency concludes his important note by urging my Government to reconsider the canal contract that it entered into, so that it limits its action to the strict use of its rights.

The President of the Republic, who I have informed about Your Excellency's letter, has ordered me to reply as follows.

Far away from my Government's foresight was the Canal Contract entered into between Costa Rica and Mr. A. G. Menocal, in which special care was taken not to digress at all from the strict right of use of the Republic, defined by the treaty of April 15, 1858 and clarified and, to a certain extent, confirmed by the Award of the President of the United States, could give rise to the observations of Your Excellency's distinguished Government, when mine, on the contrary, has had and has the full and intimate conviction that the contract absolutely does not affect in any way the rights of Nicaragua, and it also has the conviction that through this negotiation Costa Rica has contributed, with no less effort than Nicaragua, to facilitate the realization of the grandiose enterprise for the canalization of the Central American isthmus, an enterprise that links, as Your Excellency has recognized, the future of these two countries. The Costa Rican contract instead of entailing difficulties for the execution of the works, removes the serious obstacles that could have otherwise arisen in the execution of the work, and removes them by all the means within the scope of this Republic, without implying in any way whatsoever any assumption of rights not pertaining to Costa Rica.

It is a good thing that this Republic is not obliged to be an essential and inevitable party in the canal concessions that Nicaragua grants within its own exclusive territory, although, in any case, and even if the territory and waters of Costa Rica are not touched, they should take into account the opinion and vote of Costa Rica as provided in article 8 of the Treaty of April 15, 1858; Costa Rica, in such case, after giving its consultative vote, and whether or not its opinion is adopted, will never pretend to be a party in the respective negotiation.

The case at hand is completely different. Authoritative public documents, known by all of us, show that the current project for the canalization of the Central American isthmus proposes to use the Bay of San Juan del Norte, in which Costa Rica has indisputable rights of co-sovereignty; it proposes to take advantage of many miles of the San Juan riverbed, where Costa Rica has, on the one hand, a perpetual right of free navigation and, on the other hand, that of a riparian nation; it proposes to divert the waters of that river and to give an outlet to the sea through exclusively Nicaraguan territory, drying the old course, or at least significantly reducing its flow volume, and it proposes to raise the level of the waters of the San Carlos river, which is exclusively Costa Rican, and flood an entire district of this Republic, or the valley of San Carlos, in a surface of many square miles.

The plan of the business company includes excavating part of the canal in the southern zone of the San Juan river, which pertains exclusively to Costa Rica, and also to locate another part of the canal in Costa Rican territory, on this side of the border, in the isthmus that joins the Great Lake and the Bay of Salinas; all of this if it were convenient for the Company, given the absolute freedom of action it has to adopt the route that results more practical and economic.

The company can choose the Bay of Salinas, as the extremity of the canal in the Pacific, if it deems convenient, in which Costa Rica has a co-sovereignty right.

Costa Rica has granted special concessions to the Canal Association for the construction and operation of a railroad dependent on the canal, which in many parts will be located, according to all probabilities, on exclusively Costa Rican territory. It has also made liberal concessions on exemption of custom duties and colonization of large masses of land, along the river and other points, to which it has granted ownership; it has guaranteed respect for the contracts entered into outside of the Republic; it will give force and effect to the regulations to be issued for the use of the

canal; and, finally, Costa Rica has restricted its freedom of action by committing not to grant new concessions for a canal in its entire territory, or for a railroad in the entire canal zone.

In short, Costa Rica has granted to the Company, as regards Costa Rican territory, no less broad rights, and, in some cases, broader than those granted by Nicaragua with regard to its own territory.

Therefore, to state and sustain, in light of such antecedents, all of which are constant in the respective contract, that Costa Rica is not a party to the transaction, that it has intervened in somebody else's business, and lacks the right to carry out said contract, is tantamount to denying the sovereignty and independence of this Republic.

It is true that Costa Rica is not a party to the concessions that Nicaragua grants for the canal, neither is Nicaragua in those that Costa Rica might grant; but both can grant on their own behalf, and independently, those which they may deem fit, with absolute freedom of action, stipulating for themselves whatever compensation they deem sufficient for giving up what is theirs.

Your Excellency expresses the idea that the Canal Company is a creation of that Republic because of the concessions it obtained from it, and my Government does not agree with this idea. The Canal Association owes its legal existence to the will of the people who form it and to the laws, by virtue of which it was incorporated in the State of Colorado of the American Union, and will later owe its existence to the Congress of the United States, if it reaches the incorporation that remains before it. My Government considers that both Costa Rica and Nicaragua have dealt with an Association that existed beforehand, and if in any way it might be thought that the concessions of Nicaragua have given life to the Association, it would also be clear that Costa Rica, to the same degree as Nicaragua, has contributed to that end with the concessions it has granted.

The assertion that because the Canal Company received privileges and concessions from Nicaragua, it cannot also receive them, separately, from Costa Rica, when it will ineludibly need them to carry its purpose into effect, presupposes that the Company lacks legal standing to validly deal and contract with whoever and whenever it deems convenient, with the freedom that all legal persons have, and which is granted by its incorporation letter.

Nothing would hinder to such degree the realization of the canal project than the negotiation of the freedom of the business company to contract, without needing the approval of the Government of Nicaragua.

It is regrettable that Your Excellency has not deemed it convenient to point out, one by one, and with acceptable precision, those points of the contract entered into by this Government, that according to Your Excellency seriously injure the rights of Nicaragua. The stipulation of article XLVIII on the ownership of Costa Rica in the canal, if the opportunity should arise as foreseen therein, cannot be more just if it is understood that Costa Rica only acquires ownership of that part of the canal that is located in its territory, and its right is limited, in the other cases, to a condominium, when it involves a section of the canal, in which Costa Rica has co-sovereign rights, as occurs in the bays of San Juan and Salinas, and that of free and perpetual navigation when it involves those sections where Costa Rica only has a right of passage, and not sovereignty or joint ownership. Costa Rica, therefore, has not stipulated in its favor, except that which is found within the limits of its right, established by the 1858 Treaty and confirmed by the arbitral award.

If upon making the definitive trace of the Canal, only the lands and waters pertaining to Nicaragua are occupied, as it would occur if, for example, a line starting from Brito were to end in Bluefields, without touching at any point the land, waters or rights of Costa Rica, it would be evident that this Republic could not pretend to have any kind of rights in the Canal, and it would surely not pretend to have them.

Your Excellency considers that the right of Costa Rica has been satisfied, even if its districts were flooded, its rivers were diverted, portions of its territory were occupied, its ports were taken advantage of and modified, or those in which it is co-owner, its forests or quarries were utilized, and, in short, Costa Rican lands and waters were used in the entire extension determined in the contract, by offering to recognize the indemnity that may correspond, when Costa Rica claimed it; and Your Excellency considers that this is the faithful and correct interpretation of the arbitral award.

Your Excellency will allow me to manifest that such an interpretation is flagrantly contrary to the wording and spirit of the award; which is inadmissible from any viewpoint, and consequently, Costa Rica will never consent to the use of something that pertains to it without its consent. The Company, knowing the rights of Costa Rica in part of the territory and waters which the Canal will cross, requested permission from this Government even for carrying out the preliminary surveys, as it was appropriate, which was granted with the best will, and later requested and obtained the concessions that Your Excellency now observes. It can be assured, therefore, that not a step has been taken in this matter without first seeking the consent of this Republic.

In conclusion, Mr. Minister, my Government cannot have the satisfaction of fulfilling the wishes of Your Excellency regarding the reconsideration of the contract entered into with Mr. Menocal; on the contrary, taking into account the cordial relations that exist between Costa Rica and Nicaragua and the interest of a company that will bring so many benefits to both Republics, and which deserves all the sympathy and support from them, I take the liberty to beg Your Excellency to consider the reasons I have exposed herein to vindicate the rights of Costa Rica and so that this illustrated Government may be convinced that [the Government] of this Republic restricted itself to exercise its right in the negotiations entered into with Mr. Menocal.

In case these reasons do not produce the desired effect, my Government expects that Your Excellency's [Government] will deign to pinpoint the points of disagreement, so that, if inadvertently or due to any other involuntary cause of course on the part of Costa Rica, in any of them, not exposed in Your Excellency's aforesaid communication, the rights of Nicaragua were undermined, these be surmounted and the harmony that must reign between both countries be established, in a matter in which their respective interests are closely touched.

I can assure Your Excellency that my Government desires nothing more earnestly than to remove any reason that could serve as an opportunity for new discussions between this and that sister Republic, now that the old ones have happily ended with the award of the President of the United States; and I reasonably hope that in the spirit of equity and elevated justification that animates Your Excellency's Government and mine, they will know how to resolve the difficulties that Your Excellency points out on the understanding of the extension of the rights of Costa Rica and Nicaragua in the canal matter, without for an instant affecting the sincere and indestructible friendship that unites one and the other people and the Governments that rule them.

With my distinguished consideration and appreciation, I have the honor to remain your obedient servant.

(Signed) P. Pérez Zeledón.

Annex 37

NOTE FROM MR. RICARDO PACHECO, MINISTER OF FOREIGN AFFAIRS OF COSTA RICA, TO THE MINISTER OF FOREIGN AFFAIRS OF NICARAGUA.

SAN JOSÉ, 9 AUGUST 1895

National Palace

Mr. Minister:

I have had the honor to receive your letter of June 11th last, by which Your Excellency, on behalf of your Government, protests certain affirmations contained in the Message delivered by the President of the Republic to the Constitutional Congress on May 8th last, regarding the conduct of the Government of Nicaragua in the implementation of the provisions set out in the Arbitration Convention signed at Guatemala on December 24, 1886.

Your Excellency begins by saying that the general terms in which the assertions of the cited document are conceived, obligate you to note that the border question has not been discussed with this Government during the present Administration of that Republic, and that the last efforts, suspended *de facto* by the revolution that erupted in Nicaragua on April 28, 1893, date back to the first months of that year.

In this regard, allow me to call your attention to the fact that the wording of said document does not lend itself to interpretation as an allusion to the present Government of that Republic. They certainly refer to operations that should have been put in practice in another epoch. All arguments that tend to show that the just complaint they involve does not constitute a direct charge against that Administration are uncalled for.

Incidentally, I am pleased to recognize that during the Government of President Zelaya the border question between the two Republics regarding their respective territories has not elucidated. However, this circumstance could not be an obstacle to refer, in general, to the Government of Nicaragua in that Message, without excluding this or that Administration that has not intervened in the matter because, as you know, the Government is a moral entity that should always be considered that way with respect to international matters, regardless of the changes that occur in its personnel and the differences of ideals and purposes that those changes originate. The faith that should be given to international treaties that are respected and enforced cannot be based on any other principle, even if the Government personnel that executed them has disappeared from the political scene; and, on the other hand, solidarity in the succession of the Governments of a State is also universally recognized with respect to international obligations.

So then, if any of the Administrations of that Republic has hindered, in one way or another, as I will show hereunder, the effectiveness of the obligations consigned in the Treaty of 1858 and defined by the arbitral award, it is evident that the concepts cited by Your Excellency are victoriously defended against any objection that is only based on the circumstance that the Government personnel, whose conduct motivates the appreciation of the Message, no longer exists.

Your Excellency further states that it is not entirely true that Nicaragua, for one reason or another, has not concurred with its Commission, as she was obligated and is obligated, to practice the formal delimitation of the respective borders; and to support your statement, you immediately refer to all the acts that Nicaragua has executed in relation to this matter.

When the facts are exposed by you in this manner, seemingly there is no charge against Nicaragua as a result thereof, but a different thing happens when you take into account a multitude of very important details that served as a basis for the appreciation of the President of the Republic in that respect.-

I will refer to those details, begging you, in advance, not to see in the narration of these details, nor in the judgment formed by the Government in relation thereto, the slightest intention to intensify past disputes, or to relive suspicions and resentments caused by them, but rather as an effort to make the words of the Presidential Message more sincere, so as to maintain harmony and concord, which are indispensable between neighbor and fraternal peoples.

After the arbitral award was issued, my Government appointed Engineer Don Luis Matamoros and Geometer Don Ricardo Alpizar to compose the Commission that, in agreement with that of Nicaragua, would carry out the delimitation, and it was communicated to you by letter of May 8, 1888, and at the same time inviting the Government of that Republic to do the same, which, by letter of July 1st of that same year, indicated that it had appointed, on its part, Licentiate Don Salvador Castrillo and Don W.

Climie. Another letter was sent by this Ministry on September 17 of the following year, asking you to kindly indicate, within the shortest time possible, the date when your commission would be ready to commence the works, since the Commission of Costa Rica was ready and only waiting for that notice. Then the Ministry under your charge indicated that the Commission had been appointed, that the delimitation had not been practiced owing to reasons beyond the control of that Government, that Commissioner Climie was absent at that time, and that Mr. Castrillo could not fulfill his mission because he was presently taking care of other matters.

That a personal impediment of the commissioners of that Republic to immediately concur to the delimitation could be an insurmountable obstacle for the realization of such important work when, on the other hand, it was urgent to carry it out because the short time period in which it had to be completed was elapsing, is inexplicable from all points of view, and the allegation that was made in that respect cannot be entertained as an excuse.

My Government waited for the Government of Nicaragua, obliged as it was to renew the negotiations, which had been postponed at its request, to advise that its commission was ready to commence the work. It did not happen that way. In view of that, the [Government] of Costa Rica addressed your Government, by letter of June 13th of that same year, indicating that seventeen months had already elapsed since the appointment of the Commissioners and only thirteen remained to carry out the marking of boundaries, and proposing bases for the execution of the works in an adequate and efficient manner.

That very important letter was not honored with an opportune reply until May 24 of the following year, that is to say, five and a half months later, when the Government of that Republic stated that it was ready to send its commissioners, without referring at all to the proposed bases. This Government urged your Government again, by telegram of May 26, to indicate if the aforesaid bases were acceptable and finally obtained a favorable reply from the latter via telegram on the next day.

And so, Mr. Minister, that silence of Nicaragua for such a long time, although it was her duty, as I stated, to renew the negotiations, and that she had received a letter from this Secretariat which had not deserved a satisfactory reply, is another basis that led my Government to believe that your Government was avoiding the coveted conclusion of our jurisdictional disputes.

Finally, the commissioners of both Governments were able to meet in San Juan del Norte on June 15, 1890, and at a conference held at seven in the evening of that same day at the government house in that port, to the great surprise of our Delegates, Doctor Don Modesto Barrios (who was substituting Mr. Castrillo), tenaciously maintained his claim against the express text of the arbitral award stating that "Punta de Castilla" should not be considered the starting point of the common border because the constant variation of those places has caused its separation from firm land and it would not remain on the right bank of the San Juan River. Engineer Matamoros tried in vain to make him see that the arbitral award determines the boundary of the aforesaid Punta, just like it was on April 15, 1858, as the starting point of the border on the Atlantic side; and that it was very easy to determine the actual location of that Punta during that year with the map of the "Peacok" (sic) or that of "Kansas" of the U.S. Navy. Doctor Barrios was inflexible; he insisted that the Award did not know those places, that by saying "just like they were on April 15, 1858" it assumed that said land (that of Punta de Castilla) was aggregated to the continent, and that the river always passes between her and San Juan del Norte, but that since it was currently cut by the river, the right bank of the river did not begin at that location.

Mr. Matamoros indicated that the purpose of the commission was not to interpret the award or the Treaty: that both were clear and easy to implement since they indicated specific points that could be easily determined with the aforesaid maps.

Then Doctor Barrios expressed a desire to reach an agreement, citing the Arbitration Convention signed at Guatemala that authorizes the Commission to separate from the actual border up to a distance of one mile, and proposing that the starting point be fixed at "Harbor Head". The reply to that was that it was necessary to first determine the distance between that point and the Punta and then practice the mediation. In reply, Mr. Barrios persisted to argue that such operation was impossible because of the constant variation of the places.

As you will note, the specious arguments made by Mr. Barrios cannot be construed in any other way than as excuses for not carrying out the delimitation. And this is virtually the meaning given in the same proposals of the cited gentleman, who after defending the part situated to the west of "Harbor Head" as Nicaraguan territory, requests that by virtue of the faculty consigned in the Arbitration Convention the latter place be fixed as the border. If he actually thought that "Harbor Head" was the border, as he defended at the outset, he would not have proposed, as he did later, that said border be fixed, based on the authorization they had to penetrate Costa Rican soil up to one mile.

This kind of discussion, which could have been entertained as an allegation before the Arbitrator, although indefensible later when it was only a matter of enforcing the provisions set forth in an unappealable decision and in a perfectly valid Treaty, convinced our Commissioners that all efforts to dissuade those of Nicaragua from the unjust claims stated by Mr. Barrios were futile, and led to an agreement between both parties to suspend the works in the north, and to move to the Pacific, in order to initiate them again on that side. My Government accepted said disposition, confident that, as stated in the minutes drafted by all the commissioners in San Juan del Norte on June 17, as aforesaid, there was no possibility that any discussion would arise if the works were carried out at the Bay of Salinas. All the commissioners immediately went in direction to the south. They arrived at Rivas on June 23, and ours stayed there waiting for the return of those of that Republic who had gone to the interior. Time passed without the Commission of Nicaragua rejoining that of Costa Rica, so the latter decided to go to Managua to find out the reason of this delay, where it was told by Minister Delgadillo that he did not know anything about the matter. In view of this, my Government urged your Government to send its commissioners as soon as possible.

So much delay, Mr. Minister, on the part of that Republic, to order its agents to return to perform their tasks, was viewed by my Government, with all just reason, as a way to digress from the completion of the delimitation operations, which opinion was also corroborated by the inexplicable reply of Minister Delgadillo, to which I referred previously, and the weak excuse for the delay given by that Government in a telegram of July 18, stating that owing to grave and unforeseen difficulties its commissioners had not been able to concur, but would immediately leave in direction to the Bay of Salinas.

On August 4th next, the commissioners were at the location and began again their work. Not having accepted the Commission of Nicaragua the U.S. Navy ranger map of Bay of Salinas, which was presented by the Costa Rican Commission, a decision was made to make a survey; and on September 7th next, the mixed commission met in Rivas, with the objective of discussing the definitive tracing of the dividing line between the bay and Sapoa. The objective was to accurately determine the center of the bay of Salinas, in accordance with the provisions of the Award, when the commissioners of that Government, undoubtedly pretending to transform the mixed commission into a Supreme Tribunal so as to correct the defects that the arbitral award contained in their opinion, calling attention to an "error" by President Cleveland, consisting of indicating that the western limit of the bay was the line, starting from "Arranca barba" to the westernmost point of "Punta Zacate", and requested to amend the lack of equity resulting from that, at the same time indicating that it was necessary to point out that the center of the coast was the starting point of the dividing line; and, as a third point of the same, the hill of "La Cruz", which place, as you know, indisputably belongs to Costa Rica.

Such unjustifiable pretensions, after having recognized in the minutes of the meeting held in San Juan del Norte that no difficulty would arise and no discussions of any nature would be possible if they started by the bay of Salinas, evidences an unyielding determination on the part of the Nicaraguan commission to indefinitely postpone the completion of its mission.

So, against the opinion of our agents, and notwithstanding their efforts to impede it, those of Nicaragua attempted, for the second time, to transform the Commission in charge of making the delimitation in accordance with the precise and indisputable bases fixed in the Treaty of 58, in the Arbitration Convention and in the award, into a deliberating body with respect to the equity of the Award. This new obstacle and the fact that the date on which the delimitation had to be concluded was getting close, without any possibility of realizing it in the short time period that remained, led to agreement to suspend the works, commissioning Messrs. Alpizar and Collins to perform some works, and the former, especially, for all those that were deemed convenient.

With such broad authorization, Mr. Alpizar was fulfilling his mission when the Government of Nicaragua, by telegram from that Ministry dated January 1, 1891, indicated that it had been informed that the aforesaid gentleman was performing work along the border and erecting markers of lime and stone, which your Government questioned because it considered that the term for completing the delimitation had expired and because the ratification of the "Castro-Guerra Treaty" was pending, and requested that the works be suspended if they were being carried out.

As you well know, the expiration of the agreed term to execute an unappealable sentence can never be seen as a cancellation of the duties it imposes upon the Parties; otherwise, the effectiveness of the sentence would remain at the will of the injured party and, consequently, its unbending decisions would be frustrated. Since the duties and rights of Costa Rica and Nicaragua established in the aforementioned Treaty and Award with respect to the borders are imprescriptible, the obligation to delimit them must also be imprescriptible, and by virtue thereof, the fact that the Government of Nicaragua invoked the expiration of the term reveals a tendency to hinder the course of the operations that should have been facilitated, all the more reason if we consider that Mr. Alpizar was at his position in accordance with the agreement and with the authorization of both commissions, and that his work could be ratified or rectified by your Government.

As regards the pending approval of the "Castro-Guerra" Treaty, it was not sufficient reason for that Government to oppose the delimitation given that said Treaty, even if it had been ratified by Costa Rica, did not affect at all the marking of the border between the Castle and Sapoa, which was precisely the operation being carried out by Mr. Alpizar, which gave origin to your telegram to which I have been referring.

Subsequent to that incident, and as a consequence of the border dispute that arose between both Governments because armed troops from that Republic had penetrated into the place called "Los Patos", my Government proposed to your Government, on November 20, 1892, with the objective of definitively resolving the border issue between both countries in an honorable and effective manner, the appointment of two Engineers, one by each Government; as well as a third engineer, whose appointment would be requested to the American Government, so that they fix the markers in accordance with the ruling. To this rational and conciliatory proposal, the Government of Nicaragua replied that, in its opinion, the "Castro-Guerra" Treaty ended all subsequent difficulties and was waiting for the ratification of Costa Rica to proceed to the exchange.

The implicit rejection of the reasonable means of settlement proposed that said reply involved clearly indicates that the Government of Nicaragua was not thriving at that time with the best desires to concur with its commission to the territorial delimitation. That is the only consequence that can be deduced, given the cause alleged by that Government, since nothing new was established in the "Castro-Guerra" Treaty to delimit the border in the zone where "Los Patos" is located, which uncertain situation for your Government gave room to the proposal of my Government that it was irrelevant to cite this Draft Treaty as an effective way to end the disputes.

After referring to how Nicaragua has complied with the provisions of the Convention of Guatemala and the Arbitral Award, you present a formal protest on behalf of your Government with respect to the solemn declaration made by President Yglesias and contained in the following words of the Message.

"In the disputes that have arisen with Nicaragua due to the boundary jurisdiction, the Government has adopted, as a starting point to maintain and defend the sovereignty of Costa Rica, the material border delimitation made by the Costa Rican Commission, which adjusted its work to the provisions prescribed in the "Cañas-Jerez" Treaty of April 15, 1858, which were confirmed and defined by the Award of the President of the United States of North America, Mr. Grover Cleveland".

Your Excellency immediately adds that the Government of Nicaragua does not accept such declaration because both clause 3 of the invoked Treaty and clause 10 of the Arbitration Convention acknowledge its right to participate in the tracing of the dividing line and to intervene in the demarcation and to sanction it with its presence and acquiescence, and that as long as the borders are not fixed, Costa Rica and Nicaragua will have to respect the status quo and abide by the general principles of the Law of Nations to resolve any jurisdictional disputes that arise.

With respect to the aforesaid protest of your Government, I must say that the expressed words do not constitute the slightest ignorance of the rights that assist Nicaragua to intervene in the delimitation of our common border, neither does the resolution of this Government, to which they refer, hinder the unhampered exercise of those same rights. It is needless to say that your Government can send its commissioners, at any time it wishes, to review the operations of our commissioner and, in case they find them to be irregular, can notify my Government in this respect, which shall not wait to send its own, so that after they start again the works that have been suspended since 1891, they may complete this very important project. However, as long as that Republic does not indicate the manner how this matter will be carried out, it is only natural that Costa Rica, who needs to maintain, just like any country, the most cordial and frank friendship with its neighbors, provides something that, without impairing the rights of others, gives effectiveness to its own rights and removes all reason for subsequent confrontations.

Otherwise, the great efforts of both Republics to put an end to their disputes would be worthless, thereby undermining the incontestable authority of the Award and offending the dignity of the Arbitrator, who, opportunely and with such high spirit of conciliation, gladly responded to our common call and put himself at the service of peace among these Republics.

There is certainly an unknown right, Mr. Minister, not in the words of the Message, but in the question they refer to, and it is that Costa Rica has the provisions of a Treaty declared valid by a firm ruling so that they be executed without delay. To exercise that right, at least in part, is the norm of conduct that this Government has adopted, with the absolute certainty that the interests of that Republic shall not be aggrieved at all because the marking of our commissioners faithfully adjusts to the provisions of that Treaty, something that your Government has never doubted.

As regards the obligation that both Governments have to consult the status quo of the borders and the general principles of the Law of Nations with respect to any future jurisdictional disputes, I believe it is unnecessary to ponder at length since it is an incontrovertible doctrine that the positive international law resulting from the treaties and arbitral awards is the criteria that, first and foremost, should serve as the basis to resolve the conflicts between two countries; and that there is a boundary treaty between Costa Rica and Nicaragua, a point that Your Excellency cannot overlook.

I have extensively disturbed the illustrated attention of Your Excellency and I will conclude, but before I do, I would like to make known to that Government the following:

The Government of Costa Rica trusts that the present Administration of Nicaragua is animated, as you have stated, by the most sincere sentiments of good harmony with friend countries and brotherhood towards the Central American peoples and that it feels more obligated than any other to put an end in the best way possible to its long-standing border question.

Since there is a unity of ideals and purposes between the Governments of both Nations on this matter, and since the yearned conclusion of that litigation solely depends on Nicaragua concurring to execute what has been already resolved with respect to the borders in a conclusive manner, we are at a propitious moment to remove from the line that marks the common fate of both Nations the only obstacle capable of rekindling unfounded suspicions and maintaining latent motives of discord.

To this end, my Government urges your Government to accept the proposition made to Mr. Sacaza (sic), relative to the appointment of Engineers by both Parties, who, in agreement with a third, whose appointment will be requested to the President of the United States of North America, would be in charge of practicing the delimitation of territories. The Government of Costa Rica hopes that such a procedure, which can be

easily and immediately implemented in accordance to justice, as well as the interests and aspirations of both Peoples and Governments, will be accepted by Your Excellency's Government.

With sentiments of high appreciation and very distinguished consideration, I am your dutiful servant.

(Signed)
Ricardo Pacheco
It concurs

San Jose, November 1, 1895

His Excellency, the Minister of Foreign Affairs of the Republic of Nicaragua, Managua

Annex 38

NOTE FROM MR. RICARDO PACHECO, MINISTER OF FOREIGN AFFAIRS, TO THE SECRETARY TO THE DIET OF THE GREATER REPUBLIC OF CENTRAL AMERICA, 31 JULY 1897

Sir:

I have the honor to confirm to Your Excellency my cablegram of yesterday, which reads as follows:

(Here the cablegram of July 30, 1897)

By this same letter, I have the honor to send to each of the dignified members of the Most Excellent Diet printed copies of the reports that the Border Commissions presented to the Honorable Mr. Alexander, Engineer Arbitrator, due to the dispute that exists between them with respect to the status of Punta de Castilla, the starting point of the common border between Costa Rica and Nicaragua on the Atlantic side.

The simple reading of those documents suffices to convince the most concerned spirit that the news regarding the pretensions of Costa Rica over the river and port of San Juan cannot be even remotely explained by any part of the exposition of rights that assist Costa Rica, which was presented to the Engineer Arbitrator, and provides a solid basis to the opinion formulated by that Government that said rumor is the work of restless and disassociating spirits, sworn enemies of this peaceful people.

No less conclusive evidence of my assertions is the interpretation given to a decree issued by Congress, harmless as to its international scope, but highly and significantly important for the agricultural future of the fertile districts of our territory, such as that of June 11th last, that allows to import certain goods via the San Juan and Colorado [rivers], export products from San Carlos, Sarapiqui and Parismina, Tortuguero and Colorado, and exempts specific articles from the payment of import duties.

It takes no effort whatsoever to understand that the licence to introduce merchandise into the valleys that the decree refers to has to be subordinate to the conditions set for the navigation of the San Juan River, and that this is an interior river, not open by its sovereign to foreign traffic. It should be understood that such permit was referred only to Costa Rican ships, which under the Treaty of 58 and the Arbitral Award of President Cleveland, have

a right to do it, which cannot in lack of a national authorization, be utilised to embark and disembark products through ports not open to sea trade.

Only anticipating, as it was done, the species relative to our tendencies to appropriate ourselves of the river and Port of San Juan could aims attributed to the decree, with any appearance of credibility, which it does not have; however, having shown the absurdity and falsehood of said statement, any reason for the baseless interpretation to which I have been referring disappears.

I have the honor to present to the Most Excellent Diet the testimony of my respect and high consideration, and I remain, Sir, your obedient and confident servant.

Ricardo Pacheco

To His Excellency

The Secretary of the Diet

of the Greater Republic of Central America

San Salvador

Annex 39

NOTE FROM MR. JULIO MARTÍN, DIRECTOR OF ADENA, TO MR. ALFONSO ROBELO, AMBASSADOR OF NICARAGUA IN COSTA RICA. SAN JOSÉ, 27 SEPTEMBER 1993

ADENA
Telephone 506 269309 Fax 506 278861
PO Box 772 –1002 Paseo de los Estudiantes
San Jose, Costa Rica
San Jose, September 27, 1993

Mr. Alfonso Robelo
Ambassador of the Republic of
Nicaragua in Costa Rica
Hand delivered

Dear Mr. Robelo,

I take this opportunity to respectfully greet you and to request, on behalf of ADENA (Association of Nautical Sports) and the organizing Committee, that you interpose your good offices so that the authorities of your country, as the sovereign over the San Juan River, grant us the respective permit to carry out the first INTERNATIONAL SARAPIQUI BARRA DE COLORADO NAUTICAL RALLY.

This activity, which has the main purpose of delivery donations, totaling over one million colones, to six of the schools located on the banks of the River, will take place on Saturday, 9 October 1993, at 11:01 am, and is being organized in coordination with the Development Associations of Puerto Viejo de Sarapiqui and Barra del Colorado.

We estimate that the participation of an excess of 75 boats will significantly reactivate the commercial sectors in all the zones where they pass. Attached you will find a map of the route, where you will note that we will use the waters under your sovereignty for approximately 45 minutes.

Having no other matters for the time being and looking forward to a positive reply to this request, I remain with all consideration.

Sincerely yours,

(Signed)
Julio Martin O.
Director

Annex 40

NOTE FROM MR. ERNESTO LEAL, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, TO MR. ALFONSO ROBELO, AMBASSADOR OF NICARAGUA TO COSTA RICA, 8 OCTOBER 1993

MINISTRY
OF
FOREIGN AFFAIRS

Managua, Nicaragua
October 8, 1993
IA-X-0659-93

Engineer
Alfonso Robelo Callejas
Ambassador of Nicaragua in Costa Rica
San Jose.

Excellency,

In relation to the request for permission to carry out a boat competition in the San Juan River, which was presented, through you, by the *Asociación de Deporte Náutico de Costa Rica* (ADENA) and the organizers of the INTERNATIONAL SARAPIQUI-BARRA DE COLORADO RALLY, I hereby inform you as follows:

The Ministry of Foreign Affairs acknowledge receipt of said request and declares that in exercise of the sovereignty and supreme control that Nicaragua exercises on the San Juan River, and in answer to the request presented, the Chancellery of the Republic [of Nicaragua], on this occasion, has decided to grant the corresponding AUTHORIZATION for the holding of the tourist Rally with regard to the Trinidad – El Delta stretch.

In addition, it is necessary to inform the Costa Rican Nautical Association of Sport (ADENA) that it will be the responsibility of the organizers of the event, as well as of the participants in it, to properly handle garbage, plastic waste and oil, to avoid contamination and any damage to the environment in which the competition will be held.

We hope that in the future any similar request will be presented sufficiently in advance in order to analyze them and give an adequate reply.

Having no other matters of reference, I take this opportunity to greet you.

Sincerely,

/s/ Illegible
ERNESTO LEAL SÁNCHEZ
Minister

[Seal:] MINISTRY OF FOREIGN AFFAIRS
MANAGUA REPUBLIC OF NICARAGUA
CENTRAL AMERICA.

cc: file

Annex 41

NOTE FROM MR. BERND NIEHAUS, MINISTER OF FOREIGN AFFAIRS OF COSTA RICA, TO MR. ALFONSO ROBELO, AMBASSADOR OF NICARAGUA TO COSTA RICA.

SAN JOSÉ, 15 MARCH 1994

The Minister of Foreign Affairs and Worship

Mr. Ambassador:

I have the honor of addressing your Excellency to make reference to the events which have taken place in recent days in the zone of the San Juan River where officers of the illustrious Government of Nicaragua have proceeded to charge a toll tax to Costa Rican vessels navigating in the aforesaid river, with the objective of transporting tourists.

As Your Excellency well knows, the Cañas-Jerez Treaty of Limits between Costa Rica and Nicaragua provides in Article 6 that: "The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan from its outlet from the lake until it empties into the Atlantic; but the Republic of Costa Rica shall have perpetual rights, in the said waters; of free navigation from the river's mouth to three English miles below Castillo Viejo for the purposes of commerce, [objetos de comercio] whether with Nicaragua or the interior of Costa Rica, by way of the rivers San Carlos or Sarapiquí or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic. The vesselsof both countries may indiscriminately approach the shores (atracar) of the river where the navigation is common to both, without the collection of any class of imposts unless so established by the two Governments"

According to the information in the possession of the Government of Costa Rica, officers of the Government of Nicaragua have established a toll tax collection post at La Trinidad in front of the mouth of the Sarapiqui River, in which zone, according to the Cañas-Jerez Treaty, Costa Rica has the right of free commercial navigation. I must inform Your Excellency that the Minister of Public Security of Costa Rica, Mr. Luis Fishman, has contacted representatives of the Ministry of Defense of Nicaragua, without having received any satisfactory reply to date.

Further, a few days ago I personally talked with His Excellency, the Minister of Foreign Affairs of Nicaragua, Eng. Ernesto Leal, who told me that, according to information in his possession, the Government of Nicaragua had established a toll post outside of the area of free navigation, but in the light of the reiterated facts and the precise information which has been communicated to me by the Ministry of Public Security of Costa Rica on this same date, I hereby request Your Excellency to communicate to Minister Leal the statements set forth herein in order to obtain a prompt reply.

For these reasons, I hereby convey to Your Excellency the concern of the Government of Costa Rica in the light of these events, as well as the express request that said actions cease immediately.

In this respect, I would like to express to Your Excellency the firm will of the Administration of President Rafael Angel Calderón Fournier to instruct the respective Costa Rican authorities to initiate talks with their Nicaraguan counterparts, with the objective of finding a solution to the aforementioned problem, based on the full respect of the provisions of Article 6 of the Cañas-Jerez Treaty.

Notwithstanding the foregoing, I reiterate to Your Excellency the assurances of my highest esteem and consideration.

(Signed)
Bernd H. Niehaus Q.
The Minister of Foreign Affairs and Worship.

His Excellency
Mr. Alfonso Robelo Callejas
Ambassador of the Republic of Nicaragua
CITY

Annex 42

NOTE FROM MR. JUAN RAFAEL LIZANO, MINISTER OF HOME AFFAIRS, POLICE AND PUBLIC SAFETY OF COSTA RICA, TO MR. JOSÉ ANTONIO ALVARADO, MINISTER OF HOME AFFAIRS OF NICARAGUA. SAN JOSÉ, 15 JULY 1998

DM 357

Mr. José Antonio Alvarado
Minister of Governance
REPUBLIC OF NICARAGUA

Minister,

In accordance to our telephone conversation yesterday, in which I informed you that our public forces have been hindered from navigating on the San Juan River carrying regulation weapons in activities related to the provisioning and changing of the guard at the posts located on the right bank of said rivers, in Costa Rican territory, I hereby express the following:

Colonel Talavera, the Chief at the respective Military Region of the Nicaraguan Army, indicated to our officers that they could not allow our police personnel to pass due to superior orders.

I reiterate that in spite of the location of the border posts of our police in national territory, the only means of access in some cases is the San Juan River, reason for which the activity of provisioning and changing our border guards finds itself absolutely impaired by the unilateral decision taken by Nicaraguan authorities. As you know, the inhospitable and dangerous border zone obliges our police to carry regulation weapons for their personal safety and that of the vessel carrying supplies.

I wish to reiterate that the vessels used for the activities described earlier do not bear artillery and the weapons used by our police officers form part of their endowment of personal supplies, and in no way run counter to the bilateral international norms in force regarding the use of this waterway.

I kindly request that you give the necessary orders to resolve this difficult situation, reiterating our will to collaborate with the Nicaraguan authorities for the benefit of our common border security.

Yours truly,

/s/ Illegible

[Seal:]

MINISTRY OF HOME AFFAIRS, POLICE AND PUBLIC SAFETY.

JUAN RAFAEL LIZANO S.

MINISTER

Cc: File

Annex 43

NOTE FROM MR. WALTER NIEHAUS, VICE MINISTER OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA, TO MR. ADÁN GUERRA, VICE MINISTER OF FOREIGN AFFAIRS OF NICARAGUA. SAN JOSÉ, 23 MARCH 2000

The Deputy Minister of Foreign Affairs and Worship

DVM-167-2000

Mr. José Adán Guerra
Vice-Chancellor
Republic of Nicaragua
Hand Delivered

Dear José Adán:

I have carefully read with surprise your letter of today, 23 March 2000, since it was clearly stated in Costa Rica's closing argument during the round of negotiations held on Wednesday, 15 March, before the Chancellors, the OAS Secretary General, Mr. César Gaviria and you, that there were two drafts to be considered by the parties: a draft proposed by Costa Rica and another draft proposed by Nicaragua. Further, it was agreed that both texts would be submitted to the respective consultations.

In this state of things, in the letter I sent you yesterday, I repeated the text of the draft that Costa Rica presented at said meeting, except that some text was added in paragraph 10, last sentence. Further, I carefully placed this additional text in brackets.

That last paragraph in brackets tries to further clarify paragraph 10 by providing: "Said navigation shall always take place under the protection of an extensive and sufficient exchange of information as may be necessary to safeguard the exclusive dominion and sovereign jurisdiction of Nicaragua over the San Juan River, as well as Costa Rica's right of free navigation in the river (Illegible text) and those which may be necessary for the protection of said enjoyment."

Said expansion of paragraph 10, as you can see, does not impair any rights either of Nicaragua or Costa Rica, and it was sent to your office with the genuine intention of improving the understanding of the text and facilitating the dialogue.

Upon clarifying the above situation, I reiterate my will to maintain the dialogue concerning this theme under the auspices and facilitation of the Secretary General of the OAS, Mr. César Gaviria, and to hold the meeting scheduled for 12:30 p.m. on 29 March in your country, as agreed.

With the assurances of my consideration,

/s/ Illegible

Walter Niehaus

Cc: Mr. Camilo Granada

Annex 44

NOTE FROM MR. ROBERTO ROJAS, MINISTER OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA, TO MR. FRANCISCO XAVIER AGUIRRE, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA.

SAN JOSÉ, 26 OCTOBER 2000

The Minister of Foreign Affairs
DM-332-2000
Excellency,

I am pleased to address you in reference to the situation that arose on 21 October last when military authorities of the Republic of Nicaragua precluded the realization of the VII International Nautical Rally Sarapiquí River / San Juan River, on the waters of the San Juan River, on the waters of the San Juan River, which has taken place without delays on six previous occasions, and which had been reported to the Nicaraguan authorities more than a month in advance.

This act constitutes a serious violation to the rights of free navigation of the Republic of Costa Rica on the San Juan River, set out in the Cañas-Jerez Treaty, the 1888 Cleveland Award and other instruments of international law governing this matter.

The Government of the Republic of Costa Rica hereby expresses its most energetic protest for the events that took place and respectfully requests the corresponding explanations, at the same time requesting that situations that violate the right of free navigation of Costa Rica on the San Juan River be avoided in the future.

Within this context, I take this opportunity to refer to note MRE-VH-JI/483/10/00, which attempts to explain the situation that took place with members of Costa Rica's Judicial Investigation Body on 26 September last, who were precluded to freely navigate on the San Juan River in the performance of their pertinent duties.

In this regard, the Government of Costa Rica considers that the above-cited note does not satisfactorily respond to the explanations requested in our Note DVM-420-00 on 28 September 2000, and confirms the violation to our perpetual right of free navigation on the San Juan River, notwithstanding the report of passage made by the Costa Rican authorities.

The Government of Costa Rica fraternally urges the illustrious Government of Nicaragua, in order to strengthen the positive development of bilateral relations between both countries, to contribute to the consolidation of this linkage by ceasing all actions that violate the terms of the legal instruments governing relations between both nations.

I take this opportunity to reiterate to Your Excellency the assurances of my consideration and esteem.

(Signed)
Roberto Rojas

His Excellency
Francisco Xavier Aguirre Sacasa
Minister of Foreign Affairs
Republic of Nicaragua.

Annex 45

NOTE FROM MR. ROBERTO TOVAR, MINISTER OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA, TO MR. NORMAN CALDERA, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA.

ALAJUELA, 26 SEPTEMBER 2002

DM-300-02

Doctor
Norman Caldera
Minister of Foreign Affairs
Republic of Nicaragua
His Office

Dear Mr. Minister:

I am pleased to put on record some references concerning the document we have signed today in the city of Alajuela, Costa Rica.

First and foremost, I wish to reiterate that in a peace and harmony context we are encouraged to successfully implement economic integration projects, particularly the U.S.-Central America Free Trade Agreement, the Puebla Panama Plan, the Central America-European Union partnership agreement, and the creation of a special fund for Costa Rica-Nicaragua binational development. All this in favor of our peoples, who deserve the best opportunities for their socioeconomic growth.

Consistent with the spirit of transparency prevailing in these conversations, we also understand that Nicaragua keeps its reserve at the International Court of Justice. In turn, during the next three years today's legal situation will remain unaltered. That is to say, in words typically used in our countries, it will be frozen.

Additionally, it is worth stating that armed civil guard navigation will not be an issue to be dealt with during the period mentioned in the above paragraph.

After said period, each Party will be free to take the actions considered most suitable to its interests.

I appreciate your integrationist vision and your ongoing concern over the well-being of the neediest sectors, principles I fully share with you and which undoubtedly have guided our decisions.

I am sure these ideals will lead us to jointly seek the resources needed for reaching our common objectives.

Truly yours,

Roberto Tovar Fajar

Annex 46

NOTE FROM MR. MIGUEL LEÓN, PRESIDENT, ADENA, TO MR. MAURICIO DÍAZ DÁVILA, AMBASSADOR OF NICARAGUA TO COSTA RICA. SAN JOSÉ, 14 JULY 2003

Asociación de Deportes Náuticos de Costa Rica
Tel. 240-8775 Fax 240-6251
Email: adena@deportes-nauticos.com
San Jose, July 14, 2003.

Mr. Mauricio Diaz Davila
Ambassador of Nicaragua in Costa Rica
Hand delivered

Mr. Excellency,

The Board of Directors of the Costa Rican Nautical Sports Association (ADENA) cordially and warmly greets you.

As we have been doing for the last 7 years, our sport association is organizing the traditional international nautical event in the Costa Rican and Nicaraguan fluvial routes, specifically in the Sarapiqui River and San Juan River of Nicaragua. It consists of a rally or timed nautical family trip at low speed.

For this reason, we respectfully request your assistance in obtaining the authorization of the Government of your country through its different Ministries, specifically the Immigration and Naturalization Service, the Army, the Ministry of Natural Resources and any other you may consider appropriate. Likewise, were it possible, and considering that this is a sporting event, we request that you intercede on our behalf so we might be exempted from charges for visas (Migration) and Clearance Certificate fees(Army).

The event will take place on Saturday, September 13th of this year, from Puerto Viejo de Sarapiqui (Costa Rica) to the confluence of the Sarapiqui River with the San Juan River (Trinidad de Nicaragua), then continuing to San Juan del Norte (Nicaragua, Indio River lake complex), and returning, through the same route, on Monday, September 15.

The organization of the event is shared by the Management of the Indio River Lodge, where we will stay for 3 days and 2 nights.

It is our custom to take some gifts for the rural schools where we pass. In this particular case, we intend to take some supplies to the school in San Juan del Norte, Nicaragua. It would be very helpful for us if you or your staff could find out how we can contact the teachers at said educational center so as to inquire about their immediate primary needs and see how we can mitigate them.

Our commitment, as always, is to guarantee full respect for the laws of your country and sites, like national parks and protected areas, where we demand the highest care insofar as the conservation of Nature is concerned, which includes that most of our boats pass the pollution standards required as of 2006 to ensure the "non-pollution" of the waters of the rivers and their surroundings.

On behalf of our Association, in my own name, and sports in general, I thank you in advance for you invaluable assistance.

With the assurances of my highest consideration and esteem, I remain

Cordially yours,

(Signed)
Miguel A. Leon Soler
Director

cc: Alfredo Lopez, Manager, Indio River Lodge

Annex 47

NOTE FROM MR. ROBERTO TOVAR, MINISTER OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA, TO MR. NORMAN CALDERA, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA.
SAN JOSÉ, 6 DECEMBER 2004

The Minister of Foreign Affairs and Worship

DM-566-04

Excellency:

I have the honor of addressing Your Excellency to acknowledge receipt and reply to your Note MRE/DM-JI/1485/11/04 of 12 November 2004, in which you refer to the Operating Manual published by the Ministry of Foreign Relations and Worship of Costa Rica on the occasion of the 15th Latin American Summit of Heads of State and Government.

In this respect, with the spirit of brotherhood which characterizes the relations between Costa Rica and Nicaragua, this Ministry wishes to express that indeed the international boundaries of Costa Rica with Nicaragua were established in the Territorial Boundary Treaty signed between Costa Rica and Nicaragua on 15 April 1858 (Jerez-Cañas Treaty), which was ratified by the Cleveland Award of 22 March 1888. The sentence of the Central American Court of Justice of 30 September 1916 does not define the boundaries between both States, since they were established in the Jerez-Cañas Treaty and subsequently developed by the Alexander Awards.

I take this opportunity to reiterate to Your Excellency the assurances of my highest consideration and esteem.

(Signed)
Roberto Tovar Faja

(Seal:) Ministry of Foreign Affairs
San Jose, Costa Rica

Excellency
Mr. Norman Caldera Cardenal
Minister of Foreign Affairs of the
Republic of Nicaragua.

Annex 48

NOTE FROM MR. MIGUEL A. LEÓN, PRESIDENT, DIRECTIVE BOARD, ADENA, TO MR. FRANCISCO FIALLOS NAVARRO, AMBASSADOR OF NICARAGUA TO COSTA RICA.

SAN JOSÉ, 27 MAY 2005

Dr. Francisco Fiallos Navarro
Ambassador of Nicaragua
To Costa Rica

Excellency,

Receive you warm and affectionate greetings of the Board of directors of the Association of Nautical Sports of Costa Rica (ADENA).

As we have been organizing for several years, our sport association is preparing a traditional international nautical event in Costa Rican and Nicaraguan pluvial routes, specifically on the Sarapiquí River in Costa Rica and San Juan de Nicaragua River. It is a *Rally or familiar nautical stroll of low speed* valid for the Nautical National **Championship of Rallies ADENA 2005**. The event will be called **"International Rally of the Friendship Costa Rica - Nicaragua"**.

I kindly request your assistance obtaining the authorization of the Government of your country through its different Ministries, specifically the Immigration and Naturalization Service, the Army, the Ministry of Natural Resources and any other you may consider appropriate. Likewise, were it possible, and considering that this is a sporting event, we request that you intercede on our behalf so we might be exempted from charges for visas (Migration) and clearance certificate fees (Army).

The event will be carried out on Saturday 2 July of the current year, starting from Puerto Viejo de Sarapiquí (Costa Rica) to the confluence with the San Juan River (Trinidad de Nicaragua), continuing to San Juan del Norte, Nicaragua (lacustrine complex of the Indio River) returning, by the same route, on Sunday 3 July.

The organization of the event is shared with the Administration of Hotel River Indio Lodge where we will stay during 2 days and 1 night.

We use to bring some presents to the rural schools where we journeyed. In this particular case, we will bring as gift some equipment to the school of San Juan del Norte, Nicaragua.

Our commitment, as always, is the absolute guarantee of the respect of the Laws of your country and the sites as National Parks and reserves, where we ask the participants, the maximum cares as far as the conservation of the environment. That includes that our boats fulfill the pollution regulations, in force since 2006. We also guarantee the "non-pollution" of the waters of the rivers and its contours. The participant boats, boats and water motors, are sport style. Like in the past, we will take a list with the personal information of each participant and their assistants, as well as the technical characteristics of each boat for Migration requirements, MARENA and the Army.

In name of our Association, my name, one as well as of the sport in general, I thank you in advance for your kind help.

I look forward to hearing form you.

I reiterate once again our most expressive gratitude for your assistance.

With the assurances of my highest consideration and esteem, I remain cordially yours

Ing. Miguel A. León Soler
President Directive Board

c.c Sr. Minister of Foreign Affairs of Costa Rica
Sr. Minister of Home Affairs of Costa Rica
Institute of Sport, Costa Rica (ICODER)
Costa Rican Motor Federation (FECOM)
Dr. Alfredo López, Gerente Río Indio Lodge

Files

Annex 49

NOTE FROM MR. MIGUEL A. LEÓN, PRESIDENT, DIRECTIVE BOARD, ADENA, TO MR. FRANCISCO FIALLOS, AMBASSADOR OF NICARAGUA TO COSTA RICA.
SAN JOSÉ, 8 JUNE 2005

ADENA
Asociación de Deportes Náuticos de Costa Rica
Tel. 240-8775 Fax 240-6251
Email: adena@deportes-nauticos.com
San José, June 8, 2005

Dr. Francisco Fiallos Navarro
Ambassador of Nicaragua in Costa Rica
Hand delivered

Mr. Excellency,

I cordially and affectionately greet you on behalf of the Board of Directors of the Costa Rican Nautical Sports Association (ADENA).

Due to logistical reasons and negative results of our survey regarding participation at the International Rally of Friendship between Costa Rica and Nicaragua, the Board of Directors was forced to eliminate this event scheduled for next Saturday, July 2 of this year. We thank you in advance for the good offices that we requested from you before the different authorities of your country, informing you that they are no longer necessary and kindly ask you accept our apologies for the time you dedicated to this case.

To celebrate the Independence of Central America in the next month of September of this year, we are planning a similar event to the archipelago of Solentiname in the Great Lake of Cocibolca, of course with the approval of the Nicaraguan Government. We will seek to make it an international event with the participation of colleagues from Nicaragua and, if possible, from other countries of Central America. At the appropriate time, we will be requesting again your invaluable assistance in the pertinent official procedures.

I reiterate once again our most expressive gratitude for your assistance.

With the assurances of my highest consideration and esteem, I remain cordially yours,

(Signed)

Eng. Miguel A. Leon Soler
President, Board of Directors.

cc: Minister of Foreign Affairs of Costa Rica
Minister of Public Security of Costa Rica
Costa Rican Sports Institute (ICODER)
Costa Rican Motor Federation (FECOM).

Annex 50

NOTE FROM MR. NORMAN CALDERA, MINISTER OF FOREIGN AFFAIRS OF NICARAGUA, TO MR. BRUNO STAGNO, MINISTER OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA. MANAGUA, 2 JUNE 2006

MRE/DM/588/06/06

Excellency,

I have the honor to address Your Excellency in reference to the statements made to the diverse media by Mr. Fernando Berrocal, Minister of Internal Affairs, Police and Security of your illustrious Government.

In this respect, on the 26th of this month, the news agency ACAN-EFE reproduced the statements of the Minister concerning the creation, in a short term, of a specialized policy force for the surveillance of the border with Nicaragua and Panama, for which he expects to mobilize 300 policemen to the zone in the next months, motivated by the fact that, when he received that ministry on May 8 last, he found "a country with open borders".

In particular, the Minister indicated that at the border with Nicaragua, where 12 police control posts currently exist according to that information, there are plans to increase surveillance and control with 39 more posts.

Likewise, the news agency ACAN-EFE reported on Monday 29 of this month and year that Minister Berrocal informed that "the reason to create the border police is to fight drug-trafficking, migration and smuggling" and that "we are simply forming a border police in the north (Nicaragua)..."

In this regard, the Government of Nicaragua, respectful of the measures that Costa Rica and other States adopt in relation to their own security, wishes to put on the record –as expressed by Minister Berrocal- that no militarized presence of the public forces of Costa Rica has existed in the border with Nicaragua for several decades and, on the contrary, it has been a practically non-existent presence, considering that no reasons exist to justify a measure of this nature.

There have been public expressions at the highest level in relation to the sensitive content of the new Migration Law of Costa Rica in the area of human rights -qualified as "draconian" by President Oscar Arias himself- which added to this increase in force where the migratory theme is one of its purposes, forces my Government, as Your Excellency will understand, to maintain a position of great concern and vigilance.

Nicaragua is respectful of the security policies adopted by third States, but it has the obligation to watch over and try to prevent –within a framework of respect to the Sovereignty of other States- any violation to the fundamental rights of Nicaraguan nationals, regardless of their migratory status. This leads me to request to your illustrious Government the adoption of all those measures that could prevent an eventual violation of the rights of our migrants, taking into account that, in the past – including the recent past- both Governments have accompanied similar concerns of third States, such as the Mexican case.

Likewise, I manifest to Your Excellency that the Government of Nicaragua, in the spirit of good neighborliness and cordiality that governs bilateral relations, wishes to make an express reserve of its position with respect to this situation, especially as regards any eventual implication that could be given in relation to the case presented by the Government of Costa Rica on September 29, 2005, to the knowledge and decision of the International Court of Justice.

I take this opportunity to reiterate to Your Excellency the assurance of my highest and most distinguished consideration.

(Signed)
Norman Caldera Cardenal

[Seal:] MINISTRY OF FOREIGN AFFAIRS
Managua
REPUBLIC OF NICARAGUA
CENTRAL AMERICA

Excellency
Bruno Stagno
Minister of Foreign Affairs and Worship
Republic Of Costa Rica
Hand delivered.

Annex 51

NOTE FROM MRS. THAIS CHING ZAMORA, DIRECTOR, HEALTH UNIT OF THE COSTA RICAN SOCIAL SECURITY INSTITUTE, TO MR. LEOPOLDO RAMÍREZ, AMBASSADOR OF NICARAGUA TO COSTA RICA. PUERTO VIEJO DE SARAPIQUÍ, 19 JUNE 2006

COSTA RICAN SOCIAL SECURITY INSTITUTE HEALTHCARE UNIT – PUERTO VIEJO DE SARAPIQUI CENTRAL NORTH REGION.

TELEPHONE: 766-63-07 FAX: 766-61-61

June 19, 2006
358-2006

Mr. Leopoldo Ramírez Eva
Ambassador of Nicaragua
SAN JOSE, COSTA RICA

RE: AUTHORIZATION FROM THE GOVERNMENT OF NICARAGUA TO NAVIGATE ON THE SAN JUAN RIVER TO PROVIDE HEALTHCARE SERVICES TO THE COSTA RICAN BOUNDARY COMMUNITIES

Dear Sir,

We hereby request authorization from the Government of Nicaragua so that officials from the Health Unit of the Costa Rican Social Security Institute at Puerto Viejo de Sarapiquí may navigate the San Juan River to provide healthcare services to the communities of Tambor, San Antonio and Fátima. A medical visit to each of these locations is scheduled every 22 days. The Basic Integral Health Services Team (EBAIS) is made up of a physician, a nursing assistant, a pharmaceutical technician, a primary healthcare technical assistant and an office clerk (5 persons).

The transportation service to be used by the institution is: J&L Transportes Acuáticos S.A., Legal Identity Card 3-101-345313.

Name of boat : "Furia L"

Owner : Mr. Jorge Lao Jarquín, identity card 4-102-714
License : 2116
Fuel : Gasoline
Overboard : hp
Engine : Yamaha
Length : 5-50
Prop : 0.70
Beam : 2.05
Power : 100 HP
Series : 308G31
Model : F100AEPL
Registration record : TOME 0009, ENTRY 407068SEC; 003, DATE 07 05 2001
Movements Records : TOME: 0013, ENTRY 101692SEC002
Flag : Costa Rican

Due to the nature of our objective, we request that the issuance of a 6-month permit be considered.

Having no other matters of reference, we remain

PUERTO VIEJO DE SARAPIQUI HEALTH AREA

/s/ Illegible
Dr. Thais Ching Zamora
DIRECTOR
[Seal:] PUERTO VIEJO SARAPIQUI

cc: Dr. Amalia Carvajal Alvarado, Central North Regional Director
HEALTH UNIT.
File

MANAGEMENT SOCIAL SECURITY COSTA RICA

Annex 52

NOTE FROM MR. RODRIGO ZAMORA, COMUNIDAD DE ALIANZA CRISTIANA Y MISIONERA DE HORQUETAS, TO MR. LEOPOLDO RAMÍREZ, AMBASSADOR OF NICARAGUA TO COSTA RICA. HORQUETAS DE SARAPIQUÍ, 30 JUNE 2006

Comunidad Alianza Cristiana y Misionera de Horquetas

Horquetas de Sarapiquí, June 30, 2006

Messrs.
Embassy of Nicaragua
Hand delivered

To the attention of Mr. Leopoldo Ramírez E.

Dear Sirs,

We affectionately greet you and thank God for the functions that are carried out in your distinguished Embassy, strengthening the ties of friendship and brotherhood between your country and ours.

Our organization "Comunidad Alianza Cristiana y Misionera" is located at Horquetas de Sarapiquí and we are interested in carrying out missionary work that includes social assistance in the schools of Tambor and Remolinito and we have scheduled a trip for 7 July 2006. Since we must navigate a short distance that corresponds to the San Juan River, we request permission from you to make this journey because we want to abide by your strict regulations in said zone.

We do not have set dates for our subsequent journeys, but we would like to have permission to navigate that short distance and we ask for a waiver on charges inasmuch as the purposes for making use of that stretch are of social interest and the aforesaid communities have few resources.

We would like to count with your broad understanding and good will that will be rewarded by God. Thanking you in advance for your attention, we remain

Truly yours,

/s/ Illegible
Rodrigo Zamora
PASTOR
Identity Card # 1-900-192

Annex 53

NOTE FROM MR. LEOPOLDO RAMÍREZ, AMBASSADOR OF NICARAGUA TO COSTA RICA, TO MRS. THAIS CHING ZAMORA. SAN JOSÉ, 6 JULY 2006

Embassy of Nicaragua
San Jose July 6, 2006
ENCR/NFE/EMC/01-2006

Doctor
Thais Ching Zamora
Director
Puerto Viejo de Sarapiquí Health Area
Costa Rican Social Security Institute
Central North Region

Dear Dr. Ching,

I have the pleasure to refer to your kind Note No. 358-2006 of June 19, 2006, received on 06/20/2006, in which you request "AUTHORIZATION FROM THE GOVERNMENT OF NICARAGUA TO NAVIGATE THE SAN JUAN RIVER TO PROVIDE HEALTHCARE SERVICES TO THE COMMUNITIES OF TAMBOR, SAN ANTONIO AND FÁTIMA". In this respect, upon consulting the Ministry of Foreign Affairs of Nicaragua, a special authorization is hereby issued to navigate the San Juan de Nicaragua River for the stated purposes, which may not be used for any purpose or places other than those indicated or in breach of Nicaragua's full Sovereignty over the San Juan River.

This permit will remain valid for three months and may be renewed, upon prior official request from the Costa Rican Social Security Institute to this Embassy for its respective processing with the central government of the Republic of Nicaragua.

This permit is a gesture of friendship, good neighborhood and courtesy of good faith that may not be used in any other form or with the intent to harm.

Having no other matters of reference, I remain.

Sincerely yours,

(Signed)
Leopoldo Ramirez Eva
Ambassador

Annex 54

NOTE FROM MR. LEOPOLDO RAMÍREZ, AMBASSADOR OF NICARAGUA TO COSTA RICA, TO MR. RODRIGO ZAMORA, COMUNIDAD DE ALIANZA CRISTIANA Y MISIONERA DE HORQUETAS. SAN JOSÉ, 6 JULY 2006

Embassy of Nicaragua
San Jose July 6, 2006
ENCR/NFE/EMC/02-2006

Mr Rodrigo Zamora
Bishop
Comunidad Alianza Cristiana y Misionera de Horquetas
Horquetas, Sarapiquí
Costa Rica

Dear Bishop,

I have the pleasure to refer to your kind letter dated June 30, 2006, received on 07/06/2006, in which you request "AUTHORIZATION FROM THE GOVERNMENT OF NICARAGUA TO NAVIGATE ON THE SAN JUAN RIVER IN ORDER TO ACCOMPLIANCE HUMANITARIAN MISSION WHICH INCLUDE SOCIAL ASSISTANCE IN TAMBOR AND REMOLINITO'S SCHOOLS". In this respect, upon consulting the Ministry of Foreign Affairs of Nicaragua, a special authorization is hereby issued to navigate the San Juan de Nicaragua River for the stated purposes, which may not be used for any purpose or places other than those indicated or in breach of Nicaragua's full Sovereignty over the San Juan River.

This permit is a gesture of friendship, good neighborhood and courtesy of good faith that may not be used in any other form or with the intent to harm Nicaragua in any manner or circumstance.

This authorization to navigate is valid for 07 July 2006.

Having no other matters of reference, I remain.

Sincerely yours,

(Signed)
Leopoldo Ramirez Eva
Ambassador

Annex 55

DECREE OF THE CENTRAL AMERICAN FEDERAL CONGRESS, APPROVING THE ANNEXATION OF NICOYA TO COSTA RICA.

9 DECEMBER 1825

"The Federal Congress of the Republic of Central America, considering the reiterated petitions of the authorities and municipal bodies of the peoples of the Party of Nicoya, in that it be segregated from the State of Nicaragua and added to that of Costa Rica: the *de facto* union by the same peoples to said State of Costa Rica at the time of the commotions in Nicaragua; and the local situation of the Party itself, has decided to decree and declare:

ART. 1. For the time being, and until the demarcation of the territory of the States is carried out as prescribed in Art. 7 of the Constitution, the Party of Nicoya will continue separated from the State of Nicaragua and annexed to that of Costa Rica.

ART. 2. Consequently, said Party will recognize the authorities of Costa Rica, and will have in its Legislature the representation that corresponds.

ART. 3. This decree will be communicated to the Assemblies of Nicaragua and Costa Rica. Pass to the Senate. Issued at Guatemala on the ninth of December of 1825.

Annex 56

DECREE REVOKING THE RIGHTS AND PRIVILEGES GRANTED TO THE AMERICAN ATLANTIC AND PACIFIC SHIP CANAL AND THE ACCESSORY TRANSIT COMPANY.

GRANADA, 18 FEBRUARY 1856

WHEREAS, the Republic of Nicaragua, on the 22nd day of September 1849, granted to the American Atlantic and Pacific Ship Canal Company, certain rights and privileges, which said rights and privileges were subsequently modified, by decree of the 11th day of April 1850; and

WHEREAS, in consideration of said rights and privileges, said Company agreed to construct a Ship Canal across the territory of the Republic from the port of San Juan de Nicaragua, or any more feasible point on the Atlantic to the port of Realejo, Gulf of Fonseca, Tamarinda, San Juan del Sur, or any point on the Pacific Ocean, which the Engineers of the Company might decide upon; or in case that the construction, and completion of said Canal or any part of it, should become impossible, by any unforeseen want, or insurmountable obstacle of nature, to construct a railroad, or rail and carriage road and water communication between the two oceans: and

WHEREAS, the said American Atlantic and Pacific Ship Canal Company, have not constructed the said Canal nor commenced the same, but on the contrary have abandoned the undertaking, and declared it impracticable and have also failed to construct a railroad or rail and carriage road, as they agreed to do: and

WHEREAS, the said American Atlantic and Pacific Ship Canal Company was bound by the terms of said Charter to pay the Republic of Nicaragua, ten thousand dollars annually, and ten per cent on the nett profits of any route the Company might establish between the two oceans, during the term allotted for the completion of the Canal, and in furtherance thereof, and

WHEREAS, the said American Atlantic and Pacific Ship Canal Company have failed to pay annually said ten thousand dollars, together with the ten per cent nett profits, falsely and fraudulently alleging that no profits were made, and no commission due; and

WHEREAS, by the said Charter it was stipulated that for the purpose of settling all matters in dispute between the State and the Company, Commissioners should be appointed by the State on the one part and the Company on the other; and

WHEREAS, on the 12th day of November, 1855, the Republic of Nicaragua, notified the said Company to appoint commissioners, under the Charter, and the said Company expressly refused the same; and

WHEREAS, by the decree of the 9th day of March 1850, the said Company was made a body politic and corporate, with perpetual succession, by the name & description of "The American Atlantic and Pacific Ship Canal Company "; and

WHEREAS, on the 14th day of August 1851, the Republic of Nicaragua with the sole object of facilitating the maritime canal, and in accordance with the desires expressed by the company of said canal, to divide and separate from the contract of the 22nd September 1849, the part therein relating to the navigation by steam of the waters of Nicaragua, did constitute a new company, designated by the name of "Accessory Transit Company " and consisting of the same persons comprising the American Atlantic and Pacific Ship Canal Company, and subject to the same obligations. Now therefore, the Supreme Provisional Government of Nicaragua in virtue of its faculties,

DECREES:

1. The grant to the American Atlantic and Pacific Ship Canal Company of date 22nd September 1849 and the modification thereof made 11th April 1850, and all the privileges therein contained are revoked and annulled. The acts of incorporation of date 9th day of March 1850, and of the Accessory Transit Company of date 14th day of August 1851, are annulled: and the said American Atlantic and Pacific Ship Canal Company and Accessory Transit Company, are dissolved and abolished except for the purposes hereinafter mentioned.

2. Sr. Don Cleto Mayorga, Sr. Don Edward J. C. Kewen and Sr. Don George F. Alden, (any two of whom may act) are hereby appointed a board of commissioners with full powers to examine, liquidate, and ascertain the amount due by the American Atlantic and Pacific Ship Canal Company, and Accessory Transit Company to the State, with full powers to send for persons and papers, and to enforce respect and obedience to all their orders and decrees.

3. The said board shall proceed at once to discharge their duties and for this purpose shall notify the agents of the companies, residing in Nicaragua, to appear before them forthwith, to give all evidence that may be required of them, and with the privilege to defend the interests of their principals.

4. The said companies shall be considered as still in existence, for the purpose of conducting this examination and for the purpose of being held collectively responsible for such sum as may be ascertained to be due to the State, but for no other.

5. For the purpose of securing the payment of such amount the said board find due, they are hereby commanded to cause all the property of said company to be seized forthwith, and held by responsible persons subject to the order of said board.

6. That the transit of passengers across the Isthmus may suffer no interruption, the board are authorized to deliver to such responsible persons as may make application, all of said property so seized, upon their executing a bond in a sum one fourth greater than its appraised value, and with the condition that the same shall be forthcoming when called for by the said board, and that the undertakers in the bond shall continue to transport the passengers who may arrive on the side of the Pacific and Atlantic oceans and the expenses of transporting said passengers shall be charged against the said companies.

7. Before allowing the said property to be bonded the board shall cause the same to be fairly appraised by three competent persons appointed for the purpose.

8. The board shall proceed summarily and with dispatch. And on determining the amount due from the companies to the State, shall report their proceedings immediately to the Government.

9. The corporation of the board of commissioners as well as of the appraisers by them appointed, will be hereafter determined.

10. Let this be communicated to the proper authorities.

[Signed]
PATRICIO RIVAS

Annex 57

DECREE NO. 139. NICARAGUA ACCEPTS THE WAR DECLARED BY COSTA RICA. MANAGUA, 19 OCTOBER 1857

Decree No. 139 in which this Government accepts

The war made against it by that of Costa Rica

The Supreme Government of the Republic of Nicaragua to its inhabitants.

Considering that the deference of the Government of the Republic has not sufficed to contain the objects of Costa Rica and the hostile operations that it has executed to effect the expropriation of the San Juan river, Lake [...], isthmus between San Juan del [...] Virgen, so that the entire transit line remains under its power.

Bearing in mind that on August 5 the Minister of Foreign Affairs rejected the cession made by the Government of Nicaragua of the district of Guanacaste and of the right bank of the San Juan River, from a point two miles below Castillo Viejo to Punta de Castilla:

Having the Captain of the San Carlos steamer, Mr. Cauty, ordered the blockade of the Fort of San Carlos and the surrender of the public force in charge of its custody, all under the orders of the Commander General of the Republic of Costa Rica, as evidenced by the note that said Captain addressed to the Commander of that fortification, of which a printed copy is attached hereto, has agreed to declare and

DECREES:

Art. 1. Nicaragua accepts the war declared by the Government of Costa Rica and will vindicate its rights which have been deliberately violated by the conduct of that Government.

Art.2. The Republic of Nicaragua will protect and preserve its rights along the entire transit route, from San Juan del Norte, through the river and lake, to San Juan del Sur, as well as the rights it has in the district of Guanacaste, including its lands, forests and rivers.

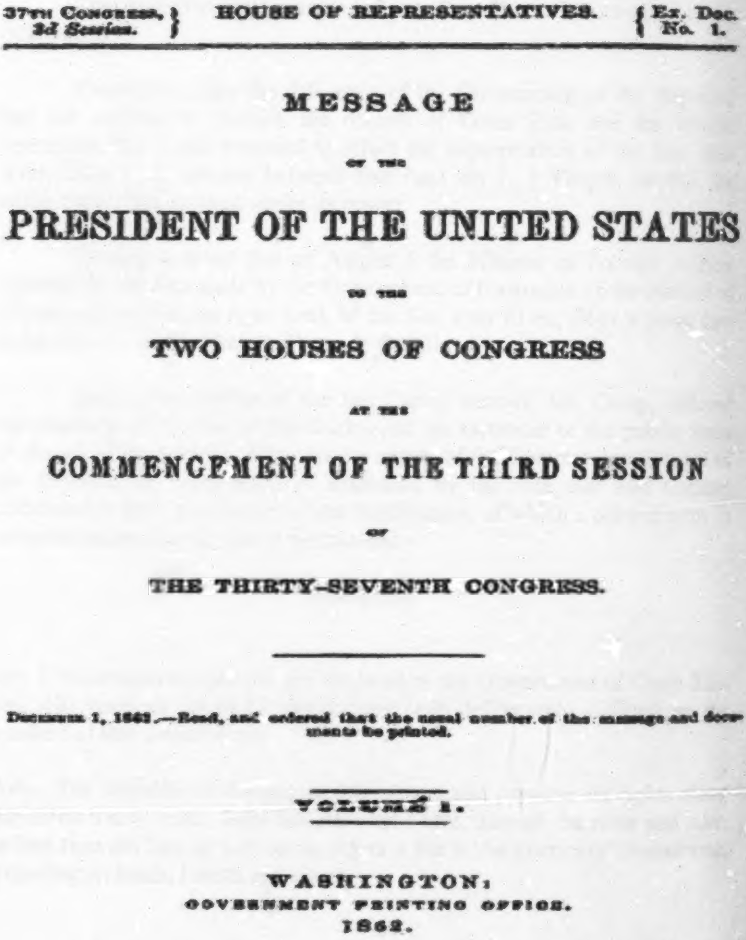
Art.3. The necessary force will be organized to execute the provisions of this decree.

Art. 4. Notify the respective parties. Done in Managua, October 19, 1857. Tomas Martinez. Máximo Jerez.

Annex 58

DECREE ORDERING THE COMMANDERS OF PORTS AND PERFECTS OF THE FRONTIERS OF NICARAGUA NOT TO PERMIT ANY FOREIGN PERSON TO GO INTO THE INTERIOR OF THE COUNTRY, UNLESS PRESENTING A PASSPORT ISSUED BY THE RESPECTIVE MINISTERS OR CONSULS AT THE PORTS OR PLACES OF THEIR DEPARTURE.

MANAGUA, NICARAGUA, 11 SEPTEMBER 1862



37th Congress, 3d Session. } HOUSE OF REPRESENTATIVES. { Ex. Doc. No. 1.

MESSAGE

OF THE

PRESIDENT OF THE UNITED STATES

TO THE

TWO HOUSES OF CONGRESS

AT THE

COMMENCEMENT OF THE THIRD SESSION

OF

THE THIRTY-SEVENTH CONGRESS.

December 1, 1862.—Read, and ordered that the usual number of the message and documents be printed.

VOLUME I.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1862.

[Translation.]

NATIONAL PALACE,
Managua, September 11, 1862.

MR. MINISTER: The president of the republic to its inhabitants: Considering the necessity of putting the republic on its guard against the inconveniencies and dangers which in all time, and especially under present circumstances, may happen to it from emigration from abroad without the precautions which are observed by civilized nations in similar cases, in the use of his extraordinary powers in the department of police decrees:

ART. 1. From and after the last day of November next the commanders of ports and prefects of the frontiers of Nicaragua shall not permit any foreign persons who have not previously settled in the republic to go into the interior, unless they present a passport from the respective ministers or consuls thereof at the ports or places of their departure, in which passport is to be given the name and surname of the person in whose favor it is issued, his profession or trade, the purpose for which they come and their nationality, the signature of the minister or consul and the seal of the republic.

ART. 2. The ministers or consuls of the republic, in issuing these passports, will observe the following rules: 1st. The treaties of Nicaragua with any nations, and reciprocal privileges to the respective subjects or citizens. 2d. That they who solicit the passport are not discharged criminals, and that if they have no money they are not, on the other hand, beggars, or sick or crippled persons, who come to rely on public charity, and that neither are they men without profession or trade, vagabonds, or persons badly provided for. 3d. That neither are they freed negroes or other degraded caste of people, unless they have a special permission for themselves or on account of others to go into the interior. 4th. That in case of coming with a design to colonize, they must have permission from the government, ratified by the chambers, and must in nowise be under the protection of another government.

ART. 3. In order that this decree may reach the knowledge of all persons who may be interested in it, the ministers of this republic at foreign courts, to whom it will be immediately communicated, shall make it known to those of the respective nations and shall procure its publication in the principal newspapers, communicating it to the consuls of the republic, and appointing them at places where there are none and where they may deem them necessary.

ART. 4. With the same object, the list of our consuls abroad and of those who may be newly appointed, shall be communicated to the commanders of our ports and to the prefects on the frontiers.

ART. 5. Central Americans and Spanish Americans only will be permitted to go to the interior on a passport of the respective port or frontier authorities, which will be issued in the same form and under rules 1st and 2d of art. 2.

ART. 6. Notwithstanding all that is hereinbefore provided, persons who go into the interior of the territory of the republic by evading the foregoing provisions or by practicing deception in regard to their place of departure, nationality, profession, trade, or purpose for which they come, will be liable to be sent out of the country at their own cost and to other proceedings to which their acts may have given rise; to which intent the authorities of the frontiers who may give or issue passports will make a list, setting down the circumstances that the passports ought to contain; which list they will transmit at the first opportunity to the ministry of the interior, and said ministry will cause it to be published in the official newspaper for the knowledge of the local authorities.

ART. 7. When the transit from one ocean to another is open, nothing of what is hereinbefore provided shall include passengers, but only those persons who come to go into the interior or to reside in the republic, and the company cannot leave them on our territory except upon those conditions, but must carry them away in the same vessels which brought them.

Given at Managua, on the 11th of September, 1862.

THOMAS MARTINEZ.

And I communicate it to your excellency for your knowledge and for fulfilment so far as your excellency is concerned, the honor befalling me of subscribing myself your excellency's obedient servant.

PEDRO ZELEDON.

His Excellency Señor DON LUIS MOLINA,
Minister Plenipotentiary of Nicaragua, &c., &c., &c.

Annex 59

PRESIDENTIAL DECREE 527, CREATING THE SOLENTINAME ARCHIPELAGO NATIONAL MONUMENT. *GAZETTE NO. 78*, 23 APRIL 1990

CREATION OF PROTECTED NATURAL AREAS IN SOUTHEAST NICARAGUA

Decree No. 527 of April 17, 1990

Published in Gazette No. 78 of 23 April 1990

THE PRESIDENT OF THE REPUBLIC OF NICARAGUA

In exercising the powers vested upon him,

Whereas:

I

Pursuant to article 60, Chapter III, of the Political Constitution of Nicaragua, it is a duty of the Revolutionary Government and a right of Nicaraguans the preservation of the environment, protection and proper exploitation of our natural resources and those sites and territories that constitute important or unique elements of the natural patrimony of the country, for the purpose of promoting and regulating its rational use, pursuing a sustainable development model that contributes to better living standards of our people, scientific research, education, production, recreation and peace.

II

A group of areas exist in the natural ecosystems of southeast Nicaragua with different categories of management and use and a variety of resources of important ecological, economic and scientific value that should be protected.

III

Natural resources and tropical humid forests, for wanting of knowledge

regarding their biological, economic and scientific importance, historically have been subject to continuous deterioration, wherefore it is necessary to develop actions to manage and protect the few reserves that exist on the planet.

IV

The purpose is to harmonize the socioeconomic development of Nicaragua, particularly in southeast Nicaragua, with the conservation and rational use of the natural resources contained in this part of the national territory, with the objective of contributing to a socially just and environmentally healthy model.

V

The IRENA Organic Law and the Law for the Creation of National Park Services in force empower and regulate the creation and management of Protected Natural Areas, such as national parks, national monuments, refuges and reserves.

DECREES:

CREATION OF PROTECTED NATURAL AREAS IN SOUTHEAST NICARAGUA

Article 1. The Southeast Protected Natural Areas are hereby created, with an unalienable character, located and comprised within the boundaries described below:

a) Solentiname National Monument in the area occupied by the Solentiname Archipelago, considered as a special area for environmental management and recovery given its natural, historical and cultural importance.

The area has a territorial extension of 189.3 square kilometres. It is located in the southeast corner of the Great Lake of Nicaragua. The description of this boundary comprises approximately one kilometre of waters adjacent to the Archipelago, beginning at a point located at 1241.2 North latitude, continuing east 12.4 kilometres to a point located at 122 West longitude and 1241.2 North latitude, continuing 18.2 kilometres southeast to a point located at 733 West longitude and 1225.4 North latitude, turning four kilometres southeast up to a point located at 730 West longitude and 1224 North latitude, continuing 11 kilometres northeast up to a point located at 722.8 West longitude and 1232.2 North latitude, continuing 13.2 kilometres west up to a point located at 709.6 West longitude and 1232.4 North latitude, continuing 8.8 kilometres north to the starting point of this description.

b) The area of Los Guatuzos Wildlife Refuge in the wetlands of Lake Nicaragua is a nesting, breeding and protection zone for a large variety of flora and fauna species, as well as for scientific research, and involves some controlled human activity.

The area covers approximately 437.5 square kilometres. This description begins at the mouth of the Pizote River in Lake Cocibolca at 609 West longitude and 1227.4 North latitude. This boundary runs east over the lakeshore up to the town of San Carlos at the origin of the San Juan River, thence continues downstream the San Juan River up to its confluence with the Medio Queso River, following the course of this river up to the boundary line at 7.55 West longitude and 1225 North latitude, thence continues over the boundary line, passing markers number 12 and 13, up to the point where the Pizote River crosses the border between Nicaragua and Costa Rica at 609 West longitude and 1221.4 North latitude, thence proceeds north along the course of the river up to the starting point of this description.

c) The Historical Monument "Fortaleza de la Inmaculada" is an area of great historical and tourism importance. It has a territorial extension of approximately 37.5 square kilometres. The description of this boundary begins at marker number 6 of the border between Nicaragua and Costa Rica at 778 West longitude and 1212 North latitude, from where it proceeds downstream the Poco Sol River up to its mouth in the San Juan River, thence proceeds downstream the course of the latter up to marker number 2 of the aforementioned border at 188 West longitude and 1217 North latitude, thence proceeds southwest over the border, passing markers number 3, 4 and 5, up to marker number 6, the starting point of this description.

d) The San Juan River-Indio-Maíz Great Biological Reserve, covering approximately 2,950 square kilometres, is an area of great national and international importance given that it contains one of the few reserves in the planet of virginal tropical humid forests of great interest for the scientific community.

It comprises forest areas, the boundaries of which begin at the mouth of the Bartola River in the San Juan River at 791 West longitude and 1214 North latitude, continuing upstream the Bartola River up to its origin north of

Cerro El Diablo at 805 West longitude and 1223 North latitude, continuing along the water parting that divides the basins of the Indio River with that of Bartola and San Cruz, passing by Cerro Romerón at a point located at 797 West longitude and 1229 North latitude until it reaches an altitude at 804 West longitude and 1243 North latitude. The boundary turns northeast over the water parting that divides the basins of the Maíz and Agua Zarca rivers, passing an altitude at 813 West longitude and 1254 North latitude up to Cerro Chiripa at 819 West longitude and 1253 North latitude, thence continues north, always over the waters parting the basins to an altitude located at 818 West longitude and 1260 North latitude.

Thence the boundary turns northeast over the waters parting the basins of the Maíz and Pijibaye rivers up to an elevation of 237 meters at 181 West longitude and 1265 North latitude. The boundary continues northeast in a straight line up to the mouth of Caño Hondo in the Atlantic Ocean at a point located at 192 West longitude and 1267 North latitude.

(...)

Article 5. IRENA is authorized to draft the preliminary regulations of this law and to submit them to the President of the Republic for approval.

Article 6. This Law shall take effect on the date of its publication in any mass media, without prejudice to its subsequent publication in the official bulletin "La Gaceta".

Done at Managua City on the sixteenth of April of nineteen ninety, "Year of Peace and Reconstruction", Daniel Ortega Saavedra, President of the Republic.

Annex 60

DECREE 28-94 DECLARING NICARAGUA'S SOUTHEAST REGION
A SUSTAINABLE DEVELOPMENT TERRITORY.
GAZETTE NO. 106. 8 JUNE 1994

DECLARATION OF THE SOUTHEAST REGION OF NICARAGUA AS "SUSTAINABLE DEVELOPMENT TERRITORY"

DECREE No. 28-94 passed on 4 June 1994

Published in Gazette No. 106 of 8 June 1994

THE PRESIDENT OF THE REPUBLIC OF NICARAGUA

WHEREAS

SOLE

The conservation of the environment and protection and rational use of natural resources and those areas of the national territory that constitute natural ecosystems is a fundamental interest of the Government in the pursuit of a sustainable development model.

THEREFORE

In exercising the powers conferred upon him by the Political Constitution,

HAS ISSUED

The following Decree:

DECLARATION OF THE SOUTHEAST REGION OF NICARAGUA AS "SUSTAINABLE DEVELOPMENT TERRITORY"

Article 1. The Southeast Region of Nicaragua is hereby declared a Sustainable Development Territory for rational use of natural resources, conservation of the environment, biodiversity and development based on the capacity of use of the soil and in particular ecotourism.

Article 2. The Inter-institutional Agreement adopted by the Nicaraguan Agrarian Reform Institute, the Ministry of Agriculture and Livestock and the Nicaraguan Institute of Natural Resources and the Environment on 29 June 1991, relative to the agro-ecological zoning of the southeast region for sustainable agricultural development, forestry exploitation and recovery and conservation of the Indio-Maíz Biological Reserve and other protected areas of the territorial system of the southeast region of Nicaragua.

(...)

Article 7. This Decree shall enter into force on the date of its publication in any mass media, without prejudice to its subsequent publication in the official gazette. Publish in the Official Gazette.

Done at Managua City, Presidential House, on the fourth of May of nineteen ninety-four, on the Week of the Environment. VIOLETA BARRIOS DE CHAMORRO, PRESIDENT OF THE REPUBLIC OF NICARAGUA.

Annex 61

DECREE 66-99 UPDATING AND DEFINING THE CATEGORIES AND LIMITS OF PROTECTED AREAS LOCATED IN NICARAGUA'S SOUTHEAST TERRITORY.

31 MAY 1999

DECREE No. 66-99 passed on 31 May 1999.

Published in the Gazette, Official Bulletin No. 116 of 18 June 1999.

THE PRESIDENT OF THE REPUBLIC OF NICARAGUA,

WHEREAS

The General Law on the Environment and Natural Resources and regulations thereof, the Law on the Organization, Competence and Procedures of the Executive Branch and Regulations on Protected Areas being in force, which constitute the framework of the Integrated System of Protected Areas for Peace (SIAPAZ), it is convenient to adjust existing regulations on protected areas in the southeast territory of Nicaragua to said legal instruments.

II

Article 154 of the General Law on the Environment and Natural Resources confers powers to the Ministry of the Environment and Natural Resources to update and delineate the boundaries and categories of the National System of Protected Areas, and Article 98 of the Regulations on Protected Areas provides that said adjustments shall be made by decree.

THEREFORE

In exercising the powers conferred by the Political Constitution of the Republic of Nicaragua,

HAS ISSUED

The following Decree:

UPDATE AND PRECISION OF CATEGORIES AND BOUNDARIES OF PROTECTED AREAS LOCATED IN THE SOUTHEAST TERRITORY OF NICARAGUA.

Article 1. PURPOSE. The purpose of this Decree is to update and delineate the categories and boundaries of Protected Areas located in the southeast territory of Nicaragua pursuant to the General Law on the Environment and Natural Resources No. 217, published in Official Gazette No. 105 of 6 June 1996, and Decree No. 14-99 regarding Regulations on Protected Areas of Nicaragua, published in Official Gazettes No. 42 and 43 of March 2 and 3, 1999, respectively.

Article 2. CATEGORIES OF PROTECTED AREAS. Pursuant to articles 20, numeral 7) and 154 of the General Law on the Environment and Natural Resources 217, and articles 8, numeral 7), 98 and 99, respectively, of Decree No. 1499 regarding Regulations on Protected Areas, the following categories of Protected Areas in the southeast territory of Nicaragua are updated and delineated:

1. "Los Guatuzos" Wildlife Refuge to "Los Guatuzos" Wildlife Refuge areas;

2. "Solentiname Archipelago" National Monument to "Solentiname" National Monument;

3. Historical Monument "Fortaleza de la Inmaculada Concepción de Maria" to Historical Monument "Fortaleza Inmaculada" area;

4. "Cerro Silva" Natural Reserve to "Cerro Silva" Natural Protected Areas of National Interest;

5. "Indio Maíz" Biological Reserve to the part of the San Juan River-Indio Maíz Great Biological Reserve that possesses said category;

6. "Punta Gorda" Natural Reserve to the part of the San Juan River-Indio Maíz Great Biological Reserve that possesses said category; and

7. "San Juan River" Wildlife Refuge to the part of the San Juan River-Indio Maíz Great Biological Reserve that possesses said category.

Article 3. BOUNDARIES OF PROTECTED AREAS LOCATED IN THE SOUTHEAST TERRITORY OF NICARAGUA. For all purposes, the following Protected Areas are updated and delineated:

1. "Los Guatuzos" Wildlife Refuge This refuge comprises some marshes or wetlands of Lake Nicaragua. Since it is a nesting, breeding and protection zone for a great variety of flora and fauna, it is suitable for scientific research and involves certain controlled human activity. It has a territorial extension of 437.5 square kilometres and it is located within the following metes and bounds:

The boundary begins at the mouth of the Pizote River in Lake Cocibolca at UTM coordinates 122 6670 N, 697 900 E. It continues along the lakeshore, in direction to the east, up to the town of San Carlos, where it flows into the lake and gives origin to the San Juan River up to its confluence with the Medio Queso River. It continues upstream along the course of this river until it reaches the border at the point of intersection located at 1225000 N (northing) 755000 E (easting). It continues along the border line, passing markers 12 and 13, until it reaches the intersection of the Pizote River with the border between Nicaragua and Costa Rica at 1221400 N, 699000 E, continuing north downstream the course of the river up to the starting point of this description.

2. "Solentiname Archipelago" National Monument. Located in Lake Nicaragua, it is a special area of environmental management and recovery given its natural, historical and cultural importance. It has a territorial extension of 189.3 square kilometres, and it is located within the following metes and bounds:

The area is located at the southeast corner of Lake Nicaragua. The description of this boundary comprises approximately 1 kilometre of waters adjacent to the Archipelago. The boundary begins at UTM coordinates 1241000 N, 722000 E, thence proceeds southeast to a point located at 1225000 N, 733000 E, thence proceeds southwest to a point located at 1224000 N, 730000 E, thence runs northwest to a point located at 1232000 N, 722000 E, thence continues west to a point located at 1232000 N, 710000 E, thence proceeds north to a point located at 1242000 N, 710000 E, and thence continues east to a point located at 1241000 N, 722000 E, the starting point of this description.

3. Historical Monument "Fortaleza de la Inmaculada Concepción de María" has a territorial extension of 37.5 square kilometres, and it is located and comprised within the following metes and bounds:

The boundary begins at Marker No. 6 on the border between Nicaragua and Costa Rica at UTM coordinates 1212650 N, 678600 E, thence continues downstream the Poco Sol River up to its outlet into the San Juan River, thence continues downstream along the course of the latter up to Marker No. 2 of the aforesaid border at 1216700 N, 788550 E, thence proceeds southwest along the border, passing Markers No. 3, 4, 5 and 6 at 1212650 N, 678600 E, the starting point of this description.

4. "Cerro Silva" Natural Reserve. Established as a Forestry Reserve, it is comprised within the following natural boundaries: Escondido River, Mahogany River, Cerro Silva, Cerro Cabeceras del Kukra, the confluence of the Serrano and Chiquito rivers, the confluence of the Mora and Punta Gorda rivers, and Punta Gorda River up to its outlet into the sea. It has a territorial extension of 3,394 square kilometres, and it is located and comprised within the following metes and bounds:

Cerro Silva Natural Reserve shall be comprised within the following perimeter:

NORTH: From the mouth of the Escondido River on the north bank in the Bay of Bluefields, it proceeds upstream up to its confluence with the Mahogany River; WEST: It proceeds upstream the Mahogany River up to its source where it crosses the municipal border of Nueva Guinea at 1315150 N, 803960 E. From this point, it continues in a straight line up to its confluence with the Piedra Fina River at 1308770 N, 801600 E, thence continues upstream to a point located at 1306810 N, 804540 E, thence continues southeast in a straight line to its intersection with the highest point (405 meters above sea level) of the hill where the headwaters of the Kukra River begin. From this point, it continues south in a straight line up to its confluence with an affluent of the Chiquito River at 1295235 N, 806490 E, thence continues downstream along this course up to its confluence with the Chiquito River, thence continues downstream up to its confluence with the Serrano River. From this point, it proceeds southeast in a straight line, passing by the highest point (285 meters above sea level) until it crosses the Mora River at 1275550 N, 804595 E, thence continues downstream along this course up to its confluence with the Punta Gorda River.

SOUTH: Punta Gorda River to its outlet into the Caribbean Sea. From this point, it proceeds northeast along the coast up to the outlet of the Escondido

River on the northern bank of the Bay of Bluefields, the starting point of this description.

Excluding the town of Bluefields, it is comprised within the following boundaries (UTM coordinates: Zone 17): The boundary begins at the Sconfra River at N 1333700, E 195940, thence proceeds downstream said river up to one of its headwaters at 1325450 N, 194650 E. From this point, it proceeds south in a straight line up to its intersection with one of the headwaters of the Musulaina Creek River at 1323975 N, 194670 E. From this point, it continues downstream said river up to its mouth at the Bay of Bluefields, then proceeds northeast along the coast, passing the town of Bluefields, up to a point located at 133 3700 N, 195 940 E, the starting point of this description.

5. "Indio Maíz" Biological Reserve. The reserve covers 2,639.8 square kilometres, and it is located and comprised within the following metes and bounds: The boundary begins at the Bartola River at UTM coordinates 1214950 N, 792400 E, thence continues downstream along the Bartola River up to a point at 1216627 N, 797554 E. From this point, it proceeds north along the trail passing by the following coordinates:

N	E
1217627	797428
1218627	797453
1219627	797402
1220627	797348
1221627	797301
1222627	797247
1223627	797196
1224627	797139
1225627	797079
1226625	797022
1227122	796353
1227953	796901
1228802	797450
1229641	798004
1230522	798423
1231515	798497
1232407	798948
1233305	799401
1233472	800365
1233592	801367

1234416	801163
1235348	800793
1236261	800853
1237185	801240
1238160	801447
1239144	801651
1240123	801817
1241116	801765
1242116	801720
1243116	801671

Until it crosses the Aguas Zarcas River at 1243968 N, 801639 E, thence continues downstream until it crosses the La Venada channel of said river at 1251700 N, 806750 E. From this point, it continues upstream up to its headwaters at 1252150 N, 809300 E, thence proceeds northeast, passing over altitudes of 461 m.a.s.l. and 413 m.a.s.l., up to the Piedra Fina River at 1256625 N, 813550 E. From this point, it proceeds upstream until it crosses an affluent of said river at 1256700 N, 814850 E. The boundary thence continues upstream up to a point located at 1256800 N, 816850 E. From this point, it proceeds northeast, passing over altitudes of 388 m.a.s.l, 474 m.a.s.l. and 491 m.a.s.l., up to one of the headwaters of the Pijibay River at 1260500 N, 818500 E. From that point, it continues downstream the Pijibay River, always 1,000 meters south, respectively, to the right bank of the same river up to the mouth in the Punta Gorda River, proceeds southwest over the coast up to a point at N 123 5675, E 189 235 (zone 17), thence proceeds west in a straight line until it crosses the north boundary of the El Pescado Lagoon at 1235675 N, 189000 E (zone 17). The boundary continues southwest from El Pescado Lagoon until it crosses the Ebo River, thence continues upstream along said river until it crosses the Pampy River. From this point, it proceeds downstream the Pampy River until it crosses the Indio River, thence continues upstream said river up to its confluence with the Casa Alta River, thence proceeds upstream said river until it crosses the wetland at 1210750 N, 196500 E (zone 17), thence proceeds southwest along the edge of the wetland until it crosses again the Casa Alta River at 209825 N, 195650 E (zone 17), thence proceeds upstream the Casa Alta River until it crosses again the wetland at 1209075 N, 194705 N (zone 17), thence proceeds north along the edge of the wetland until it crosses a river (without name) at 1211200 N, 192240 E (zone 17), thence proceeds northeast, downstream the river, until it crosses again the wetland at 1211100 N, 192550 E (zone 17), thence runs along the wetland until it crosses another river (without name) at 1208000 N, 191800 E (zone 17), thence proceeds downstream until it crosses again the wetland at 1208125 N, 192430 E (zone 17), thence continues along the edge of said wetland until it crosses the Caño Deseado River at 1206440 N, 191160 E (zone 17), thence proceeds downstream along said river where it crosses the wetland at 1207180 N, 192670 E (zone 17). The boundary thence proceeds along the wetland until it crosses the San Juanillo River at 1206260 N, 194950 E (zone 17), thence proceeds downstream said river until it crosses again the wetland at 1205700 N, 194800 E (zone 17), thence continues southeast over the wetland until it crosses the El Misterioso River at 1203650 N, 195350 E (zone 17), thence proceeds upstream said river until it crosses again the wetland at 120025 N, 194900 E (zone 17). From this point, it continues over the wetland until it crosses again the El Misterioso River at 1203650 N, 195370 E (zone 17), thence continues downstream until it crosses again the wetland at 1203025 N, 194900 E (zone 17), thence continues along the edge of the wetland until it crosses the Silico Lagoon at 1202480 N, 199450 E (zone 17), thence proceeds southwest, upstream the Silico Lagoon, along the edge of the lagoon and wetland up to a point located at 1199250 N, 199160 E (zone 17). From this point, it proceeds southeast in a straight line where it crosses a contour, 10 meters above sea level, at 1199050 N, 199300 E (zone 17), thence proceeds along the contour until it crosses the wetland at a point located at 1196450 N, 201400 E (zone 17). From this point, it continues south along the edge of the wetland up to a point located at 1195801 N, 201750 E (zone 17). From this point, it continues southwest a distance of two kilometres from the south bank of the San Juan River up to the Bartola River at 1214950 N, 792400 E, the starting point of this description.

6. "Punta Gorda" Natural Reserve. This reserve is part of the former San Juan River-Indio Maíz Great Biological Reserve. It has a territorial extension of 549 square kilometres and it is located and comprised within the following metes and bounds:

The boundary begins at the confluence of the Punta Gorda River with the Pijibay River at UTM coordinates 1269250 N, 185375 E (zone 17). From this point, it proceeds southwest upstream the Punta Gorda River up to its confluence with the Agua Zarca River at 1272825 N, 804750 E, thence continues upstream said river until it crosses a river (without name) at 1251700 N, 806750 E. From this point, it proceeds upstream up to its origin at 1252150 M, 809300 E, thence proceeds northeast, passing over altitudes of 461 and 413 meters above sea level, up to the Piedra Fina River at 1256625 N, 813550 E. From this point, it continues upstream until it crosses an affluent of said river at 1256700 N, 14850 E, thence continues upstream up to a point located at 1256800 N, 816850 E. From this point, it proceeds northeast, passing over altitudes of 388, 474 and 491 meters above sea level, up to one of the headwaters of the Pijibay River at 1260500 N, 818500 E. From this point, it continues downstream the Pijibay River, always at a distance of 1,000 meters south from the right bank of the same river, up to its confluence with the Punta Gorda River at 1269250 N, 185375 E (zone 17), the starting point of this description.

7. "San Juan River" Wildlife Refuge is part of the former San Juan River-Indio Maíz Great Biological Reserve and covers 430 square kilometres. It is located and comprised within the following metes and bounds:

The boundary begins at the Bartola River at UTM coordinates 214950 N, 792400 E. From this point, it proceeds downstream the Bartola River until it crosses the north bank of the San Juan River at 1214050 N, 790700 E. From this point, it proceeds west until it crosses the south bank of the San Juan River at 1214050 N, 790450 E. From this point, it continues downstream the San Juan River, along the border with the Republic of Costa Rica, up to the Caribbean Sea at 209500 N, 208650 E. From this point, it proceeds northwest over the coast up to 1235675 N, 189235 E (zone 17), thence proceeds west in a straight line until it crosses the north bank of the El Pescado Lagoon at 1235675 N, 189000 E (zone 17), thence proceeds southwest from the El Pescado Lagoon until it crosses the Ebo River, thence continues upstream said river until it crosses the Pampy River. From this point, it proceeds downstream the Pampy River until it crosses the Indio River, continuing upstream said river up to its confluence with the Casa Alta River. It continues upstream along said river until it crosses the wetland at N 121 0750, E 196 500 (zone 17). It continues southwest along the edge of the wetland until it crosses again the Casa Alta River at N 120 9825, E 195 650 (zone 17). It continues upstream along the Casa Alta River until it crosses again the wetland at N 120 9075, N 194 705 (zone 17). It continues north along the edge of the wetland until it crosses a river (without name) at N 121 1200, E 192 240 (zone 17). It proceeds northeast, downstream along the river, until it crosses again the wetland at N 121 1100, E 192 550 (zone 17), continuing along the wetland until it crosses another river (without name) at N 120 8000, E 191 800 (zone 17). It continues downstream until it crosses again the wetland at N 120 8125, E 192 430 (zone 17), continuing along the edge of said wetland until it crosses the Caño Deseado River at N 120 6440, E 191 160 (zone 17). It continues downstream along said river where it crosses the wetland at N 120 7180, E 192 670 (zone 17). The boundary continues along the wetland until it crosses the San Juanillo River at N 120 6260, E 194 950 (zone 17), thence upstream said river until it crosses again the wetland at N 120 5700, E 194 800 (zone 17). It continues southeast over the wetland until it crosses the El Misterioso River at N 120 3650, E 195 350 (zone 17), thence continues upstream said river until it crosses again the wetland at 1203025 N, 194900 E (zone 17). From this point, it proceeds over the wetland until it crosses again the El Misterioso River at 203650 N, 195370 E (zone 17), thence continues upstream until it crosses again the wetland at 1203025 N, 194900 E (zone 17), thence continues along the edge of the wetland until it crosses the Silico Lagoon at 1202480 N, 199450 E (zone 17), thence proceeds southwest, upstream the Silico Lagoon, along the edge of the wetland and said lagoon up to 1199250 N, 199160 E (zone 17). From this point, it proceeds southeast in a straight line where it crosses a contour 10 meters above sea level at 1199050 N, 199300 E (zone 17), thence continues along the contour until it crosses the wetland at 1196450 N, 201400 E (zone 17).

From this point, it proceeds south along the edge of the wetland up to a pointed located at 1195800 N, 201750 E (zone 17). From this point, thence proceeds southeast, always at a distance of 2 kilometres from the south bank of the San Juan River, up to the Bartola River at 1214950 N, 792400 E, the starting point of this description .

(....)

Article 9. REPEALS. Decrees No. 527 and 28-94, published in Official Gazette No. 78 of April 23, 1990, and Official Gazette No. 106 of June 8, 1994, are hereby repealed, as well as any provision opposed thereto.

Article 10. EFFECTIVE DATE. This Decree shall take effect on the date of its publication in the Official Gazette.

Done at Managua, on the thirtieth of May of nineteen ninety-nine. ARNOLDO ALEMÁN LACAYO, President of the Republic of Nicaragua. ROBERTO STADTHAGEN VOGEL, Minister of the Environment and Natural Resources.

Annex 62

POLITICAL CONSTITUTION OF COSTA RICA.
8 JUNE 1917 (ART. 5)

CONSTITUENT NATIONAL ASSEMBLY

POLITICAL CONSTITUTION

CHAPTER I

The Republic and the Government in general

Article 5. The territory of the Republic, comprised between the Atlantic and Pacific oceans, is bounded to the northwest by the Republic of Nicaragua, from which it is separated by the line fixed by the Cañas-Jerez Treaty of April 15, 1858, and by the Cleveland award of March 22, 1888. To the southeast, it is bounded by the Republic of Panama, from which it is divided by the line defined by the Loubet award of September 11, 1900, the Anderson-Porras Treaty of March 17, 1910, and the White Award of September 12, 1914.

(...)

Annex 63

POLITICAL CONSTITUTION OF COSTA RICA.
7 NOVEMBER 1949 (ART. 5)

We, the Representatives of the people of Costa Rica, freely elected members to the National Constitutional Assembly, invoking the name of God and reaffirming our faith in democracy, decree and enact the following

CONSTITUTION OF THE REPUBLIC OF COSTA RICA.

TITLE I

THE REPUBLIC

SOLE CHAPTER

ARTICLE 1. Costa Rica is a free and independent democratic Republic.

(...)

ARTICLE 5. The national territory is bounded by the Caribbean Sea, the Pacific Ocean, and the Republics of Nicaragua and Panama. The boundaries of the Republic are those fixed by the Cañas-Jérez Treaty of April 15, 1858, ratified by the Cleveland Award of March 22, 1888, with respect to Nicaragua, and by the Echandi Montero-Fernández Jaén Treaty of May 1, 1941, with regard to Panama.

The Coco Island, located in the Pacific Ocean, is part of the national territory.

(...)

Annex 64

JURISPRUDENCE REGARDING ARTICLE 46
OF THE 1949 COSTA RICAN CONSTITUTION

ARTICLE 46.

Monopolies, freedom of trade, agriculture and industry.

Private monopolies, as well as any act, even if originated by virtue of law, which may threaten or restrict freedom of trade, agriculture or industry, are prohibited.

Action by the State directed to prevent any monopolistic practices or tendencies is in the public interest.

The companies organized as de facto monopolies shall be governed by special legislation.

Establishment of new monopolies in favor of the State or the Municipal Governments shall require the approval of two-thirds of the full membership of the Legislative Assembly.

JURISPRUDENCE

Constitutionality

The exercise of the freedoms established in the Constitution is not absolute and may be subject to regulation and even restrictions when higher interests are at stake. The Forestry Law protects higher ranking interests than merely individual (interests) of the holder or owner of the land subject to forestry regulation, thus the restrictions imposed by said Law on agricultural labor and which have been accused as unconstitutional, do not injure the guarantee of article 46 of the Political Charter inasmuch as what the State has done is restrict the exercise of the property attributes for reasons of social interest. (Full Court, ext. s. 5-17-84).

(...)

The freedom of trade that exists as a constitutional guarantee is the right that any person has to engage, without restrictions, in a commercial activity legally permitted that is more convenient for his interests. But in the exercise of that activity, the person is subject to the regulations established by law, such as would be the fixing of consumer prices, determination of the salaries to be paid to the workers and, eventually, limitation of profits as deemed convenient. Thus the exercise of trade does not entail the right to unrestricted freedom, especially in the face, as in the instant case, of a regulation that is considered of general interest. (Full Court, ext. s. 11-27-80). (Dissenting vote of five Justices). (Full Court, ord. s. 7-9-7).

(...)

Freedom of trade is subject to legal regulations and if the fixing of maximum selling prices by the Executive Branch in the case at hand is supported on the Law for the Defense of Consumers (No. 5665 of 28 February 1975), the constitutionality of which has not been challenged, the Executive Decree in question does not violate article 46 of the Constitution. (Full Court, ext. s. 11-16-78).

(...)

Free exercise of labor and trade, in spite of their benefits and advantages, must be subject to regulation and, in certain cases, subject to restrictions, not in an effort to make hateful discriminations, but, on the contrary, with the objective of making them more advantageous and useful, on the basis of avoiding that the lack of certain regulations permits abuses to the benefit of a few and to the detriment of a majority.

Absolute and unrestricted freedom cannot be conceived in the sense that it cannot be subject to some restrictions that are established to make them possible within social coexistence. The regulation of the commercial activity is not prohibited by the Constitution itself, inasmuch as the rights it consecrates for its exercise require certain restrictions for individual benefit and the public good. In synthesis, in order to exercise our rights and, at the same time, guarantee the rights of the rest, it becomes necessary to define and limit the sphere of our powers. This is possible on the basis of dictating restrictive measures and, in certain cases, on the basis of imposing penalties for those who commit abuses and infringe the prohibitive rules. (First Chamber of the Court, No. 64 of 6-9-81).

(...)

The freedom of trade, consecrated in article 46 of the Constitution, is not a subjective right of an unrestricted or absolute character given that, like all laws, it is subject to regulations or limitations of general interest.

Therefore, the Ministry of Finance has not acted arbitrarily in dictating the order by way of which it prohibits the importation of beans by the appellant company through the border with the Republic of Nicaragua, inasmuch as it did so within the reasonable scope of its powers, and in view of the necessity of solving the serious problem that the Minister sets out in his answer to the complaint, related to the economic policy of the Government of the Republic and the harmful consequences that the massive importation of the grains would have in the current circumstances. (Full Court, s. 8-7-75).

Annex 65

POLITICAL CONSTITUTION OF NICARAGUA. 9 JANUARY 1987 AS MODIFIED IN 1995 (ARTS. 1, 138, NUMERAL 12, 150, NUMERAL 8 AND 182)

TITLE I. FUNDAMENTAL PRINCIPLES

SOLE CHAPTER

Article 1: Independence, sovereignty and national self-determination are irrevocable rights of the people and the foundation of the Nicaraguan nation. All foreign interference in the internal affairs of Nicaragua or any attempt to undermine these rights is an attack upon the life of the people. It is the duty of all Nicaraguans to preserve and defend those rights."

(...)

Article 138: The National Assembly has the following powers:

(...)

12. To approve or reject all international treaties, conventions, pacts, agreements and contracts covering economic, international trade, regional integration, defense and security; those which increase the external debt or commit the credit of the nation and those that constitute an obligation to the internal legal order of State.

Said instruments shall be presented to the National Assembly within fifteen days from the date of execution; shall only be considered and debated in general terms and shall be approved or rejected no later than sixty days after submission to the National Assembly. Upon expiration of this term, it shall be deemed as approved for all legal effects.

(...)

Article 150: The President of the Republic has the following powers:

8. To direct the international relations of the Republic. To negotiate, enter into and sign treaties, conventions or agreements and other instruments set

forth in subparagraph 12) of article 138 of the Political Constitution to be ratified by the National Assembly.

(...)

Article 182: "The Political Constitution is the fundamental law of the Republic; all other laws will be subordinate to it. No law, order, treaty or other arrangement that opposes or alters the constitution will be valid."

(...)

Annex 66

JUDGMENT OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF COSTA RICA. EXP: 00-007391-0007-CO-RES: 2001-08239. SAN JOSÉ, 14 AUGUST 2001

Case: 00-007391-0007-CO

Res: 2001-08239

CONSTITUTIONAL DIVISION OF THE SUPREME COURT OF JUSTICE. San Jose, at sixteen hundred hours on August fourteenth two thousand one.-

Action of unconstitutionality filed by F. J. A. U., holder of identity card number (...), and C.V.P., identity card number (...) against the International Treaty signed by and between the Presidents of the Republics of Costa Rica and Nicaragua, Miguel Angel Rodríguez Echeverría and Arnoldo Alemán Lacayo on June twenty-ninth two thousand, relating to the free navigation of Costa Rican boats on the San Juan River, the acts setting forth the agreement issued by the national authorities; that is, the diplomatic note sent by the President of Costa Rica to the leader of Nicaragua on June twenty-eighth two thousand, and the acquiescence of Costa Rican government officials with the interpretation relating to the scope of that agreement by Nicaraguan Government officials. Miguel Angel Rodríguez Echeverría, President of the Republic of Costa Rica, Walter Niehaus Bonilla, Minister of Tourism, temporarily serving as Minister of Foreign Relations and Worship, and Román Solís Zelaya, on behalf of the Office of the Attorney General of the Republic, also intervened in the proceeding.

(...)

Whereas,

VII. As to the violation of the Cañas-Jerez Treaty and the Cleveland Arbitral Award complained of by way of the challenged act. Clear as to the substantive and jurisprudential background which establish the rights held by the State of Costa Rica with respect to the San Juan River, and based on the premise that in accordance with Articles 5 and 7 of the Political Constitution, the aforementioned international instruments are part of the constitutional parameters which this Court must enforce vis-à-vis the actions of its authorities and inhabitants, the Court must decide whether the note

sent by the President of Costa Rica to the President of Nicaragua on June twenty-eighth two thousand – as affirmed by plaintiffs – is contrary to the spirit and text of the said provisions; answered by the President of Nicaragua on June twenty-ninth two thousand, stating – as to the pertinent parts herein – his will to uphold the status in effect prior to July nineteen ninety-eight. With respect thereto, the Court holds that the challenged act does not appear to seek any modification whatsoever of border regulations in force and effect between the two countries, inasmuch as the text specifically alludes to reestablishing a *modus operandi* which had been in use temporarily, prior to July nineteen ninety-eight. On the one hand, the contents of the note do not contradict the Cañas-Jerez Treaty, the Cleveland Award and the judgment of the Central American Court of Justice. It is not contradictory, inasmuch as the said instruments provide that Nicaragua has complete sovereignty and authority over the San Juan River, while Costa Rica holds the perpetual right to use its lower banks for commercial, revenue and security purposes. The referenced note states only that the Government of Costa Rica shall inform its peer in Nicaragua each time its police force must navigate on the San Juan River with law enforcement equipment. It is worth noting that in the note at issue, the said navigation is not subject to obtaining a permit, but to – as was stated – simple communication, which is entirely in keeping with the terms of the instruments governing the matter. The possibility for navigation by other types of Costa Rican boats is not limited in any way whatsoever either, and there is no waiver of any other rights held by Costa Rica in respect of the lower banks of the San Juan River. In fact, in the challenged note, the President of the Republic of Costa Rica clearly shows the will of its Government to return to the practice existing between both countries prior to July nineteen ninety-eight, at which time the Government of Nicaragua prevented the movement of armed Costa Rican police officers in the waters of the San Juan River. Therefore, we find that the note at issue does not dispute the rights acknowledged to the Costa Rican State in respect of the San Juan River, wherefor, it cannot be understood that either the repeatedly mentioned international instruments, or Articles 5 and 7 of the Political Constitution have been violated.

VIII. Conclusion. On the basis of the foregoing arguments, this Court concludes that the diplomatic note sent by the President of the Republic of Costa Rica on 28 June 2000 to the President of Nicaragua, is not unconstitutional, and consequently declares the present action of unconstitutionality without basis, dismissing it from the Court.

Therefore:

The action, as to the diplomatic note signed by the President of the Republic of Costa Rica on July twenty-eighth two thousand, addressed to the President of the Republic of Nicaragua, is rejected. As to the remainder, the action is rejected outright.

Luis Fernando Solano C.

President, *Ad Interim*

Luis Paulino Mora M. Eduardo Sancho G.
Carlos M. Arguedas R. Adrián Vargas B.
Susana Castro A. Alejandro Batalla B.

MCP/oc/4céd.-

Annex 67

LAW NO. 7410. GENERAL LAW OF THE COSTA RICAN POLICE
(ART. 24).
SAN JOSÉ, 26 MAY 1994

Article 24. Attributions:

The border Police has the following attributions

a) To patrol and protect maritime, land and air borders, including public buildings where customs and immigration activities are carried out.

b) To enforce the political Constitutional, international treaties and laws that guarantee the integrity of the national territory, territorial waters, the continental shelf, the patrimonial sea or exclusive economic zone, the air space and the exercise of the rights that correspond to the State.

(...)

Annex 68

RESOLUTION OF THE REPUBLIC OF NICARAGUA'S NATIONAL ASSEMBLY ON THE JOINT COMMUNIQUÉ CUADRA-LIZANO, 30 JULY 1998. ORDINARY SESSION NO. 5. MANAGUA, 18 AUGUST 1998

WHEREAS.

SOLE:

That the Joint Communiqué of the past July 30th of 1998 between the Minister of Defense of Nicaragua and the Minister of Interior, Police and Public Security of Costa Rica, trying to authorize the navigation of boats of the Public Force of Costa Rica in the San Juan River, it is violating and harmful to the national sovereignty of the Nicaraguan territory, clearly established in the Jerez-Cañas Treaty, the Cleveland Award and consecrated in our Political Constitution.

THEREFORE:

In use of the faculties that grants the Political Constitution of Nicaragua and the General Statute of the National Assembly,

RESOLVES:

I

To annul in total and definitive form and declared unconstitutional the pretended authorization contained in the subscribed Joint Communiqué between the Ministers of Defense of Nicaragua and the Minister of Interior, Police and Public Security of Costa Rica, the past July 30th of 1998, relative to the navigation of Costa Rican ships with armed men on the San Juan River, for being violating and harmful to the national sovereignty that exerts Nicaragua with exclusive character on this river.

II

To ratify the terms contained in the official diplomatic correspondence made public by the Ministry of Foreign Affairs of Nicaragua, the 11th of August 1998, in which, in accordance with the official position of this honorable National Assembly, it declares without any legal value, and therefore null and nonexistent the Joint Communiqué related in Point 1 of the present Resolution.

III

To reiterate the integrity of our territorial rights and the sovereignty of Nicaragua in the San Juan River, in agreement with the Jerez – Cañas Treaty, the Cleveland Award and the Political Constitution of Nicaragua.

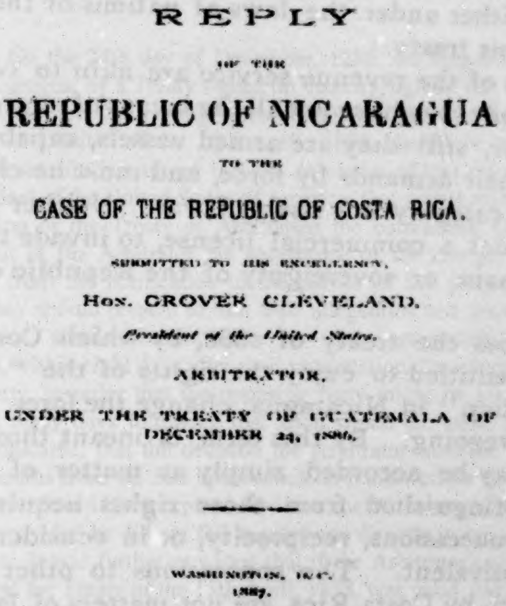
Given in the Room of Sessions of the National Assembly of Nicaragua, the eighteenth of August of the year ninety ninety eight

(Signature)
PRESIDENT OF THE NATIONAL ASSEMBLY

(Signature)
SECRETARY OF THE NATIONAL ASSEMBLY

Annex 69

REPLY OF THE REPUBLIC OF NICARAGUA TO THE CASE OF THE REPUBLIC OF COSTA RICA SUBMITTED TO HIS EXCELLENCY HON. GROVER CLEVELAND, PRESIDENT OF THE UNITED STATES.
WASHINGTON, 1887, P. 49



REPLY

OF THE

REPUBLIC OF NICARAGUA

TO THE

CASE OF THE REPUBLIC OF COSTA RICA.

SUBMITTED TO HIS EXCELLENCY,

Hon. GROVER CLEVELAND,

President of the United States,

ARBITRATOR,

UNDER THE TREATY OF GUATEMALA OF
DECEMBER 24, 1886.

WASHINGTON, D.C.
1887.

war? It is claimed such navigation is needed to protect commerce. Against whom is such protection needed? Certainly not against Nicaragua, for that cannot be interfered with, even in case of actual hostilities. No other power can interfere, because the sovereign right vests solely and exclusively in Nicaragua.

The presence, then, of armed vessels would be a menace to the peace of Nicaragua, and cannot be admitted, either under the laws of nations or the provisions of this treaty.

Vessels of the revenue service are akin to vessels of war. While they have not all the means of aggression as the former, still they are armed vessels, capable of enforcing their demands by force, and must be classed in the same category as vessels of war. Neither have the right, under a commercial license, to invade the territory, domain, or sovereignty of the Republic of Nicaragua.

Nor does the treaty of 1868, by which Costa Rica becomes entitled to enjoy the rights of the "most favored nation" in Nicaragua, change the force or effect of the foregoing. By this term is meant those rights which may be accorded simply as matter of favor as contradistinguished from those rights acquired from mutual concessions, reciprocity, or in consideration of some equivalent. The concessions to other nations referred to by Costa Rica are not matters of favor, but have been granted in consideration of advantages gained by Nicaragua, and hence do not extend to other nations.

TENTH.

As the reasons for making the stipulations of Article VIII have disappeared, must Nicaragua be still obliged not to grant canal concessions through her territory

Annex 70

GEORGE L. RIVES REPORT.
2 MARCH 1888

Assistant Secretary of State.
To the President:

SIR: On the 24th day of December, 1886, the Republics of Costa Rica and Nicaragua, by a Treaty signed on that day, agreed that the question pending between the Contracting Governments in regard to the validity of the "Treaty of Limits" of the 15th April, 1858, should be submitted to arbitration. It was further agreed that the Arbitrator of that question should be the President of the United States of America; that within sixty days from the ratification of the Treaty of Arbitration the contracting Governments should solicit of the Arbitrator his acceptance of the charge; that within ninety days from the notification to the parties of the acceptance of the Arbitrator they should present to him their allegations and documents; that the Arbitrator should communicate to the representative of each Government, within eight days after their presentation, the allegations of the opposing party, in order that the opposing party might be able to answer them within thirty days following that upon which the same should have been communicated; that the decision the Arbitrator must be pronounced within six months from the date upon which term allowed for the answers to the allegations should have expired; and that the Arbitrator might delegate his powers, provided he did not fail to intervene directly in pronouncing the final decision. It was further provided that if the Arbitrator's award should determine that the Treaty of the 15th April, 1858, was valid, the same award should also declare whether Costa Rica has the right of navigation of the river San Juan with vessels of war or of the revenue service ; and that he should in the same manner decide, in case of the validity of the Treaty, upon all the other points of doubtful interpretation which either of the parties might find in the Treaty and communicate to the other within thirty days after the exchange of ratifications of the Treaty of arbitration.

(...)

No decision of this question is, however, necessary; for it is only important, for present purposes, to point out that no precise line of demarcation can be found in any of the earlier documents. Nor is this surprising in view of the fact, to be inferred from the evidence that the region through which the line ran was a rough, densely wooded and thinly settled country, where no need was felt of any exact delimitation in the days of the Spanish dominion.

But with the establishment of the Federal Republic, and still more, with the dissolution, the questions of boundary began to assume importance.

The Federal Constitution seems to have provided by its Article VII for the demarcation of each State; but nevertheless nothing was done towards the establishment of the line between Costa Rica and Nicaragua.

In 1838 Costa Rica seems to have urged upon Nicaragua – then assuming the rank of an independent State upon her withdrawal from the Federation – a desire for a recognition of the annexation of Nicoya. In 1846, 1848 and 1852 other fruitless negotiations were undertaken with a view to settling the boundary; and in 1858, when the Treaty of Limits was signed, the question, in one form or another, had been before the two Governments for at least twenty years.

That the documentary evidence was slight and unsatisfactory, has been already shown; and that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guaranties' of the 8th March, 1841- which asserts as the boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua, and the River San Juan.

I now proceed to state the history of the negotiations which resulted in the Treaty in question, and of the executive and legislative acts which are relied on by Costa Rica as constituting a sufficient ratification.

The long and bitter struggle in which Nicaragua and other Central American States had been involved, and of which the part played by Walker and the filibusters was the most notorious incident, came to an end in 1857. The Republic of Costa Rica had taken part in that struggle, and her case states as a fact that at the close of the contest the Costa Rican troops held military positions on both sides of the San Juan. The argument of Nicaragua seems to imply that such possession was not taken until after the close of the war; but the fact itself is not in dispute. It was regarded by Nicaragua at the time, as constituting a casus belli; and Costa Rica having failed to withdraw her troops, war was declared by Nicaragua on the 25th November, 1857,- although negotiations for a settlement of the difficulty still continued, but without success.

In this posture of affairs the Republic of San Salvador offered mediation through its Minister Colonel Don Pedro Rómulo Negrete. Owing principally, as it would seem, to Colonel Negrete's earnest efforts, the opposing Governments appointed Ministers Plenipotentiary, who met with the Salvadorian Minister at San José de Costa Rica, and there concluded the Treaty of Limits,- the validity of which is now under examination.

By that instrument, the boundary line is made to begin at Punta de Castilla, at the mouth of the San Juan River; thence it follows the right or Southern bank of that stream to a point 3 miles below the Castillo Viejo; thence it runs along the circumference of a circle drawn round the outworks of the Castle as a center, with a radius of three miles, to a point on the Western side of the Castle, distant two miles from the River; thence parallel to the San Juan and the Lake, at distance of 2 miles therefrom to the Sapoá River; and thence in a straight line to the center of Salinas Bay on the Pacific Ocean. The Treaty further provides that surveys shall be made to locate the boundary; that the Bay of San Juan del Norte and Salinas Bay shall be common to both Republics; and that Nicaragua shall have, exclusively, dominion and supreme control of the waters of the San Juan – Costa Rica having the right of free navigation for the purposes of commerce in that part of the River on which she is bounded. It was further agreed that in the event of war between Costa Rica and Nicaragua, no act of hostility was to be practiced in the Port of the River of San Juan, or on the Lake of Nicaragua; and the observance of this article of the Treaty was guaranteed by the Republic of San Salvador.

It is admitted by the parties to the present arbitration that the Treaty was duly ratified by Costa Rica on the 16th April, 1858; and that it was not ratified at all by San Salvador. It is further established that there was some ratification by representatives of Nicaragua – but whether or not such ratification was sufficient is one of the points now in controversy, and it is therefore necessary to examine fully the powers and the proceedings of the Nicaraguan authorities.

The Republic of Nicaragua, as appears from the evidence, was a Constitutional Government of limited powers, which were defined by a written Constitution. Nicaragua, as one of the States of the Central American Republic, adopted her first Constitution on the 8th April, 1826. Upon the dissolution of the Federal Republic she assumed the rank of an independent nation; and in 1838 adopted a new Constitution, which her representatives now contend was in full force and vigor at the time of the execution of the Treaty of Limits. The full text of the Nicaraguan Constitution of 1838 is not contained in the arguments which have been laid before the Arbitrator; but it sufficiently appears that power was vested in an elective President and a Congress. It also appears that by Article 2 (cited in full below), the boundaries of the State were defined; and that by Article 194, quoted in the argument of Nicaragua, a complicated method of amendment was provided, of which the only feature now necessary to notice is that no proposed amendment shall take effect until it has been approved by two successive Legislatures.

In 1857 the necessity for a complete revision of the Constitution of 1838 seems to have been generally recognized. The long and exhausting conflicts which had been waged from 1854 to 1857, and the existence, during the greater part of that time, of two hostile governments, each claiming to exercise constitutional and supreme power throughout the country, had demonstrated, to the satisfaction of the inhabitants, the importance of changes in the organic law. Accordingly a Constituent Assembly, with ample powers, was duly elected. The due election, and the full constituent powers of this body, are facts not disputed in the arguments now submitted on behalf of Nicaragua.

In November, 1857, the Constituent Assembly met, and addressed itself at once to the task of framing a new Constitution for Nicaragua, as well as of legislating upon the ordinary affairs of the nation.,

On the 18th of January, 1858, the previous negotiation with Costa Rica having failed, the Assembly ordered new Commissioners to be appointed to negotiate treaties of peace, limits, friendship, and alliance between Nicaragua and Costa Rica.

On the 5th February, 1858, a further and supplemental decree on the same subject, was adopted, which is as follows:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative faculties with which it is invested, decrees:

Article 1. For the purpose that the Executive may comply with the decree of January 18 instant, the said Executive is hereby amply authorized to act in the settlement of the difficulties with Costa Rica in such manner as it may deem best for the interest of both countries, and for the independence of Central America, without the necessity of ratification by the legislative power.

Article 2. Such treaties of limits as it may adjust shall be final, if adjusted in accordance with the bases which separately will be given to it; but, if not, they shall be subject to the ratification of the Assembly.

What were the separate bases of negotiation given to the Nicaraguan Executive does not appear from any of the documents submitted to the Arbitrator. But it is not distinctly asserted by the representatives of Nicaragua that such instructions were disregarded in the negotiation of the Treaty.- the arguments relied on to prove its invalidity resting upon entirely different grounds, which will be stated hereafter.

On the 15th April, 1858, the Treaty of Limits was signed by the Plenipotentiaries of Costa Rica, Nicaragua and San Salvador; and on the 26th April, 1858, ratifications were personally exchanged by the Presidents of Costa Rica and Nicaragua, who met for the purpose on Nicaraguan territory at the City of Rivas. The Treaty had not then been passed upon by the Assembly, the decree of ratification being by the President alone. It is as follows:

TOMAS MARTINEZ, the President of the Republic of Nicaragua:

Whereas General Máximo Jerez, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the Republic of Costa Rica, has adjusted, agreed upon and signed, on the 15th instant, a Treaty of Limits, fully in accordance with the bases which, for that purpose, were transmitted to him by way of instructions; finding that said Treaty is conducive to the peace and prosperity of the two countries, and reciprocally useful to both of them, and that it facilitates, by removing all obstacles that might prevent it, the mutual alliance of both countries, and their unity of action against all attempts of foreign conquest; considering that the Executive has been duly and completely authorized by legislative decree of February 26th ultimo to do everything conducive to secure the safety and independence of the Republic; and by virtue, furthermore, of the reservation of faculties spoken of in the Executive decree of the 17th instant:

Does hereby ratify each and all of the articles of the Treaty of Limits, made and concluded by Don José Maria Cañas, Minister Plenipotentiary of the Government of Costa Rica, and Don Maximo Jerez, Minister Plenipotentiary of the Supreme Government of Nicaragua, signed by them on the 15th instant and ratified by the Costa Rican Government on the 16th. And the additional act of the same date is likewise ratified.

On the 28th May, 1858, thirty-two days after the ratification, and forty-three days after the signature of the Treaty of Limits, the following decree was passed by the Constituent Assembly:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative powers vested in it, decrees:

Sole Article. The Treaty of Limits concluded at San José on the 15th of April, instant, between General Don Máximo Jerez, Minister Plenipotentiary from this Republic, and General Don Jose Maria Cañas, Minister Plenipotentiary from the Republic of Costa Rica, with the intervention of Colonel Don Pedro Rómulo Negrete, Minister Plenipotentiary from Salvador, is hereby approved."

On the 19th August, 1858, the Constituent Assembly adopted the new Constitution, of which it is only needful to cite the first Article, viz:

The Republic of Nicaragua is the same which was, in ancient times, called the Province of Nicaragua, and, after the independence, State of Nicaragua. Its territory is bounded on the East and Northeast by the Sea of the Antilles; on the North and Northwest by the State of Honduras; on the West and South by the Pacific Ocean; and on the Southeast by the Republic of Costa Rica. The laws on special limits form part of the Constitution

(....)

I conclude, therefore, that the third ground of objection stated by Nicaragua is untenable.

And having examined in detail the three reasons urged by Nicaragua for holding the Treaty invalid, and finding all these reasons untenable, I conclude that the Arbitrator should decide in favor of the validity of this Treaty.

G. L. Rives.
DEPARTMENT OF STATE, March 2, 1888.

Annex 71

GEORGE L. RIVES REPORT (SECOND).
2 MARCH 1888

If the Treaty of the 15th April, 1858 is valid, what is its true meaning in respect of the various matters submitted for decision?

One question of interpretation is formulated by the Treaty of Arbitration itself, and eleven others are submitted by Nicaragua under the sixth article of the Treaty.

The preliminary question, which is expressly raised by the Treaty of Arbitration, is as follows: "If the Arbitrator's award should determine that the Treaty [of 1858] is valid, the same award shall also declare whether Costa Rica has the right of navigation of the River San Juan with vessels of war or of the revenue service."

The answer to this question depends upon a consideration of Article VI of the Treaty of 1858, which reads as follows:

(...)

[page number 210-212 of the handwritten version]

The right of Nicaraguan vessels to land freely on the Costa Rican side confers no right on Costa Rica to maintain a river police. She has undoubtedly the right to establish Custom Houses along the River, and to maintain a force of revenue officers. But this force need not necessarily patrol the river in boats. This may be a convenient way of preventing smuggling; but it is not so necessary an incident to the right of Costa Rica to enforce her customs laws as to be inevitably implied *ex necessitate* from the provisions of the Treaty.

The stipulations of Article IV throw no light on this question. All that article requires is that Costa Rica should repel foreign aggression on the river with all the efficiency within her reach. If under the terms of the Treaty, Costa Rica is not permitted to maintain vessels of war on the River she cannot be regarded as derelict if she fails to oppose foreign aggression in that quarter by her naval forces. Impossibilities are not required. Costa Rica would only be bound to contribute to the defence of the stream by land, a mode of defence, it may be added, which seems better adapted to a River of the size and character of the San Juan.

The matter is less clear when we consider the rights conferred by this Treaty in the light of international usage, for the present case appears to be one without exact precedent, which must be governed by analogies more or less remote.

(...)

[page number 218-219 of the handwritten version]

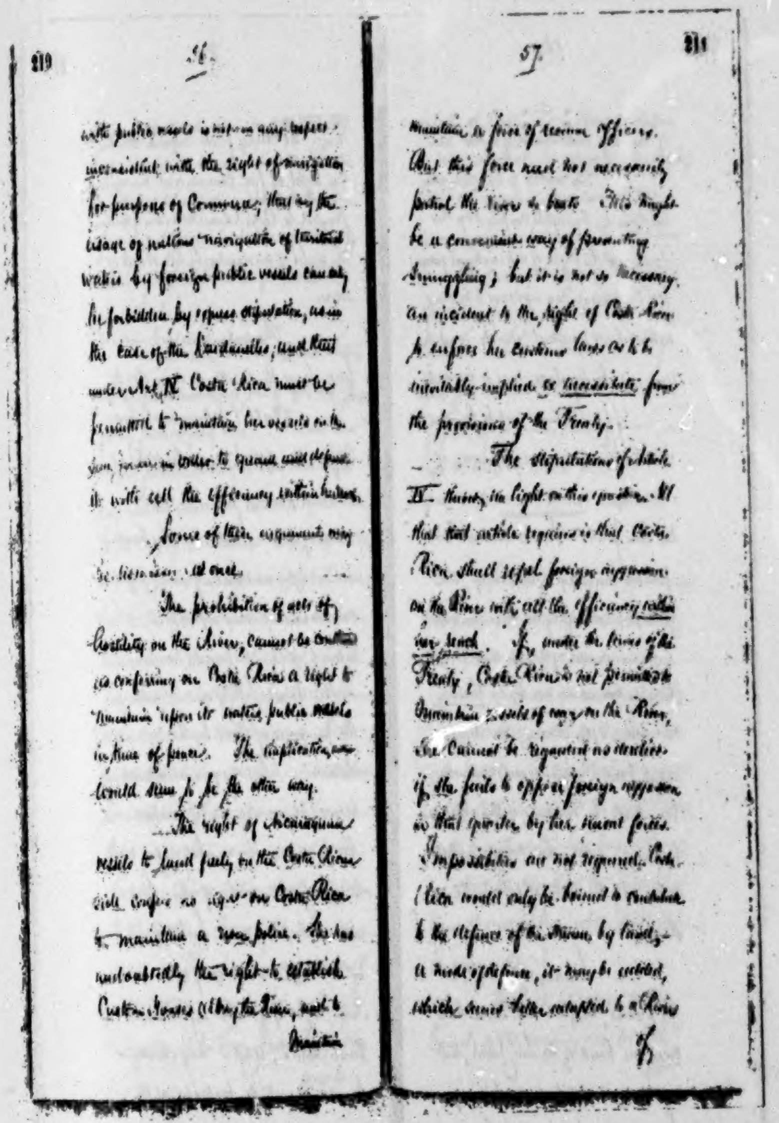
The preliminary question of interpretation, as to the right of navigation of the San Juan by public vessels of Costa Rica should, therefore, in my judgment, be answered by saying that the vessels of war and of the revenue service belonging to Costa Rica have the same privilege of navigating the River San Juan as are usually accorded in their territorial waters by civilized nations to the public vessels of friendly powers in time of peace, -- but no other, or greater privileges.

(...)

The question, as propounded, is some what ambiguous, but it may be answered thus: The Treaty of April 15, 1858, gives Costa Rica a right to be a party to grants for inter-oceanic canals only in cases where the construction of the canal involves an appropriation or flooding of Costa Rican territory, - or an encroachment on the harbors of San Juan del Norte or Salinas, or the destruction or serious impairment of the navigation of the River San Juan in any of its branches and at any point more than three miles bellow Castillo Viejo.

I have thus considered all the questions submitted to the arbitrator, and I respectfully advise that an award be made in accordance with the foregoing views. I submit herewith a form of award which, if my conclusions be approved, maybe executed in triplicate, -one copy to be filed in the Department of State, and the others to be delivered to the representatives of the Governments of Costa Rica and Nicaragua respectively.

G. L. Rives
Department of State
Washington
March 2nd, 1888



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with public vessels is not in any respect inconsistent with the right of navigation for purposes of Commerce; that by the usage of nations navigation of territorial waters by foreign public vessels can only be forbidden by express stipulation, as in the case of the Dardanelles; and that under Art. IV Costa Rica must be permitted to maintain her vessels on the San Juan in order to guard and defend it with all the efficiency within her reach.

Some of these arguments may be dismissed at once.

The prohibition of acts of hostility on the River, cannot be construed as conferring on Costa Rica a right to maintain upon its waters public vessels in time of peace. The implication would seem to be the other way.

The right of Nicaraguan vessels to land freely on the Costa Rican side confers no right on Costa Rica to maintain a river police. She has undoubtedly the right to establish Custom Houses along the River, and to maintain

57.

211

maintain a force of revenue officers. But this force need not necessarily patrol the River in boats. This might be a convenient way of preventing smuggling; but it is not so necessary an incident to the right of Costa Rica to enforce her customs laws as to be inevitably implied ex necessitate from the provisions of the Treaty.

The stipulations of Article IV throw no light on this question. All that that article requires is that Costa Rica shall repel foreign aggression on the River with all the efficiency within her reach. If, under the terms of the Treaty, Costa Rica is not permitted to maintain vessels of war on the River, she cannot be regarded as derelict if she fails to oppose foreign aggression in that particular by her naval forces. Impossibilities are not required. Costa Rica would only be bound to contribute to the defence of the River by land — a mode of defence, it may be added, which seems better adapted to a River

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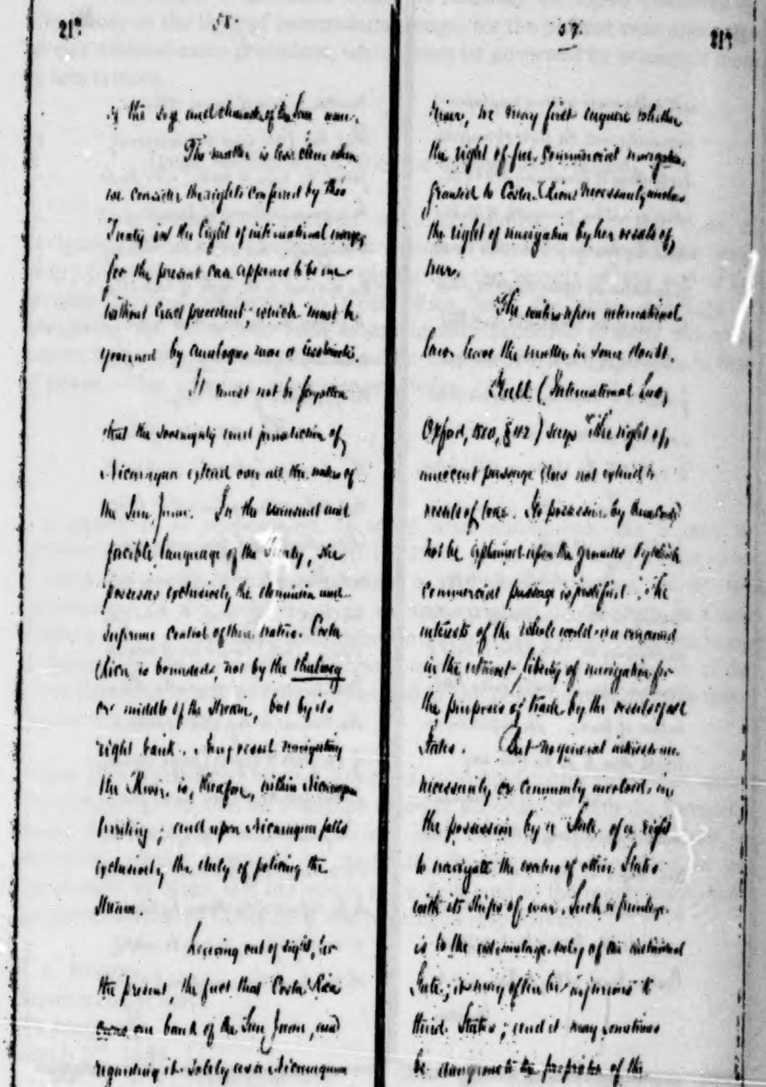

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of the bay and channel of the San Juan.

The matter is less clear when we consider the rights conferred by this Treaty in the light of international usage, for the present case appears to be one without exact precedent; which must be governed by analogous cases as indicated.

It must not be forgotten that the sovereignty and jurisdiction of Nicaragua extend over all the waters of the San Juan. In the unusual and forcible language of the Treaty, she "possesses exclusively the dominion and supreme control of these waters." Costa Rica is bounded, not by the thalweg or middle of the stream, but by its right bank. A vessel navigating the River is, therefore, within Nicaraguan territory; and upon Nicaragua falls exclusively the duty of policing the stream.

Leaving out of sight, for the present, the fact that Costa Rica owns one bank of the San Juan, and regarding it solely as a Nicaraguan

river

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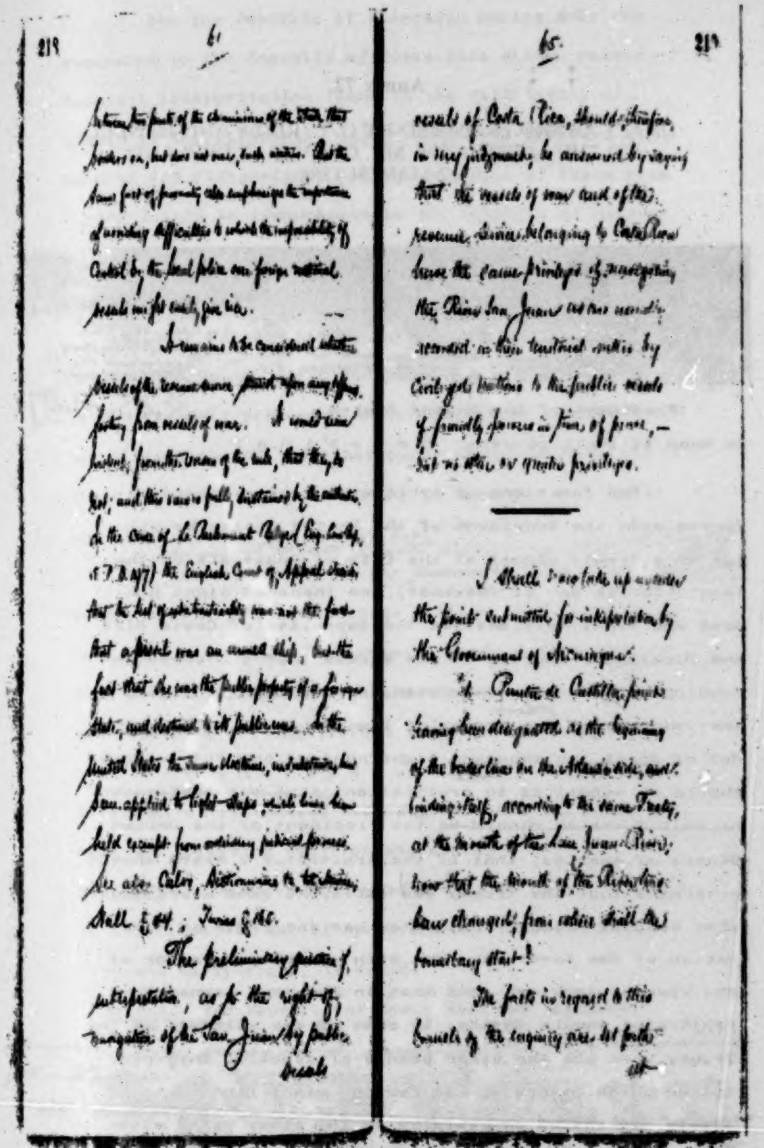
21°

river, we may first inquire whether the right of free commercial navigation granted to Costa Rica necessarily includes the right of navigation by her vessels of war.

The writers upon international law leave this matter in some doubt.

Hall (International Law, Oxford, 1880, § 42) says "the right of innocent passage does not extend to vessels of war. Its possession by merchant vessels is explained upon the ground that commercial passage is justified: the interests of the whole world are concerned in the utmost liberty of navigation for the purposes of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual State; it may often be injurious to third States; and it may sometimes be dangerous to the safety of the

country



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between two parts of the dominions of the State that borders on, but does not own, such waters. But the same fact of proximity also emphasizes the importance of avoiding difficulties to which the impossibility of control by the local police over foreign national vessels might easily give rise.

It remains to be considered whether vessels of the revenue service, stand upon any different footing from vessels of war. It would seem evident, from the reason of the rule, that they do not; and this view is fully sustained by the authorities. In the case of Le Parlement Belge (Eng. Law Rep. 5 P.D. 197) the English Court of Appeal said that the test of exterritoriality was not the fact that a vessel was an armed ship, but the fact that she was the public property of a foreign State, and destined to its public use. In the United States the same doctrine, in substance, has been applied to light-ships, which have been held exempt from ordinary judicial process. See also Calvo, Dictionnaire de Droit International; Hall § 44; Twiss § 166.

The preliminary question of interpretation, as to the right of navigation of the San Juan by public vessels

65 218

vessels of Costa Rica, should, therefore, in my judgment, be answered by saying that the vessels of war and of the revenue service belonging to Costa Rica have the same privilege of navigating the River San Juan as was naturally accorded in their territorial waters by civilized nations to the public vessels of friendly powers in time of peace, — but no other or greater privileges.

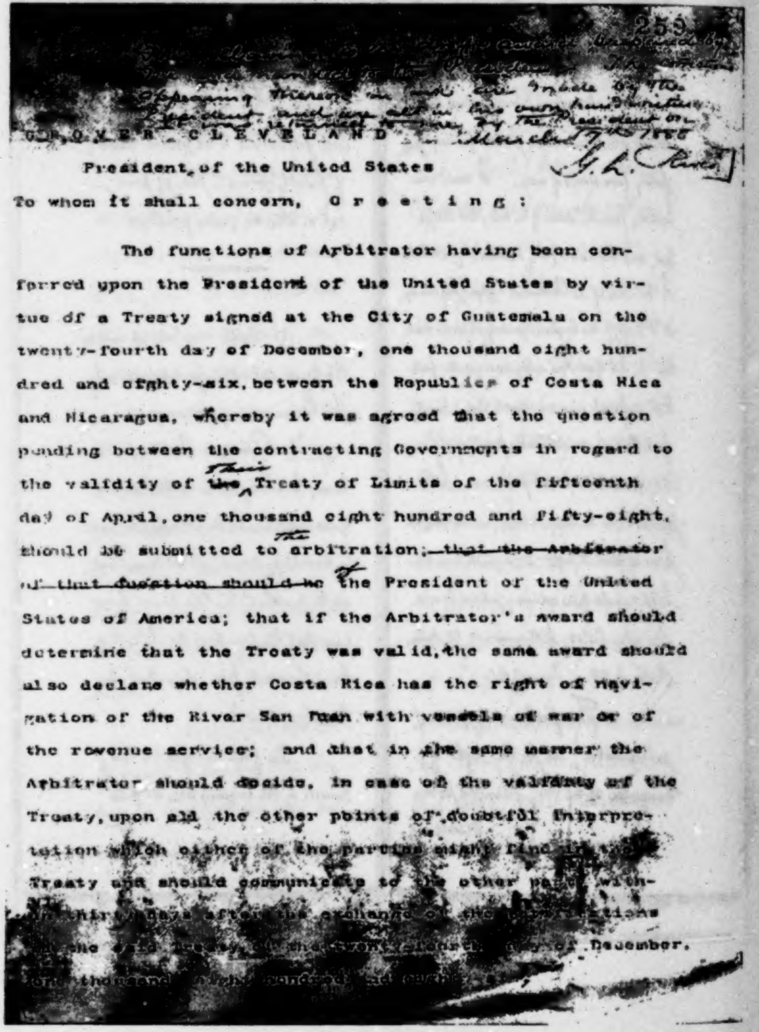
I shall now take up in order the points submitted for interpretation by the Government of Nicaragua.

1. Punta de Castilla, point having been designated as the beginning of the border line on the Atlantic side, and binding itself, according to the same Treaty, at the mouth of the San Juan River; now that the mouth of the River has changed, from where shall the boundary start?

The facts in regard to this branch of the inquiry are set forth at

Annex 72

DRAFT AWARD PREPARED BY G. L. RIVES AND HANDED TO THE ARBITRATOR MR. GROVER CLEVELAND. 17 MARCH 1888



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[illegible] for the President [illegible] appearing thereon [illegible] are made by the President [illegible] all in his own handwriting [illegible] by the President on March 17th 1888

G. L. Rives

GROVER CLEVELAND

President, of the United States

To whom it shall concern, Greeting:

The functions of Arbitrator having been conferred upon the President of the United States by virtue of a Treaty signed at the City of Guatemala on the twenty-fourth day of December, one thousand eight hundred and eighty-six, between the Republics of Costa Rica and Nicaragua, whereby it was agreed that the question pending between the contracting Governments in regard to the validity of ~~the~~ their Treaty of Limits of the fifteenth day of April, one thousand eight hundred and fifty-eight, should be submitted to the arbitration ~~; that the Arbitrator of that question should be~~ of the President of the United States of America; that if the Arbitrator's award should determine that the Treaty was valid, the same award should also declare whether Costa Rica has the right of navigation of the River San Juan with vessels of war or of the revenue service; and that in the same manner the Arbitrator should decide, in case of the validity of the Treaty, upon all the other points of doubtful interpretation which either of the parties might find in the Treaty and should communicate to the other party within thirty days after the exchange of the ratifications of the said Treaty, on the twenty-fourth day of December, one thousand eight hundred and eighty [illegible]

And the Republic of Nicaragua having duly communicated to the Republic of Costa Rica eleven points of doubtful interpretation found in the said Treaty of Limits of the fifteenth day of April, one thousand eight hundred and fifty-eight; and the Republic of Costa Rica having failed to communicate to the Republic of Nicaragua any points of doubtful interpretation found in the said last mentioned Treaty;

And both parties having duly presented their allegations and documents to the Arbitrator, and having thereafter duly presented their respective answers to the allegations of the other party as provided in the Treaty of the twenty-fourth day of December, one thousand eight hundred and eighty-six;

And the Arbitrator having pursuant to the fifth clause of said last named treaty ~~thereafter~~ delegated his powers to the Honorable George L. Rives, Assistant Secretary of State, who, after examining and considering the said several allegations, documents, and answers, has made his report in writing thereon to the Arbitrator;

Now therefore, I, GROVER CLEVELAND, President of the United States of America, do hereby make the following decision and award.

First. The above mentioned Treaty of Limits signed on the fifteenth day of April, one thousand eight hundred and fifty-eight, is valid.

Second. The Republic of Costa Rica ~~has the same~~ under said treaty and pursuant to the stipulations contained in the sixth article thereof, has not the right of navigation of the River San Juan with vessels of war; but she may navigate said River with such ~~[illegible]~~ of the Revenue Service vessels as

may be ~~properly~~ related and connected
~~privileges of navigating the River San Juan with ves-~~
with her enjoyment of the "purposes of
~~sels of war or of the Revenue service as civilized na-~~
commerce" accorded to her in said article
tions ~~usually accord in their territorial waters to~~
~~be necessary for the security of the same.~~
~~the public vessels of friendly powers in time of peace~~;
or as may be necessary to the protection of
~~but no other or greater privileges:~~ said enjoyment;

Third. With respect to the points of doubtful interpretation communicated as aforesaid by the Republic of Nicaragua, I decide as follows:

1. The boundary line between the Republics of Costa Rica and Nicaragua on the Atlantic side begins at the
extremity of Punta de Castilla at the
~~most easterly of the islands which lie near the mouth~~
mouth of the River San Juan de
~~of the Harbor of San Juan del Norte; and all of such~~
Nicaragua River as they both existed on the
~~islands as have been formed by a process of accretion~~
fifteenth day of April 1858. The ownership
~~and disruption from the sand spit which, in 1858, exist-~~
of any accretion to the said Punta de
~~ed at the extremity of the Punta de Castilla, are in-~~
Castilla is to be governed by the laws
~~cluded within the territory of the Republic of Costa~~
applicable to that subject.
~~Rica~~

2. The central point of the Salinas Bay is to be fixed by drawing a straight line across the mouth of the Bay and determining mathematically the centre of the closed geometrical figure formed by such straight line and the shore of the Bay at low-water mark.

3. By the central point of Salinas Bay is to be understood the centre of the geometrical figure formed as above stated. The limit of the Bay towards the ocean is a straight line drawn from the extremity of Punta Arranca Barba nearly true South to the Western-

~~most portion of the land about Punta Sacate, the said line being marked AB on the chart of Salinas Bay annexed to the original answer of the Republic of Nicaragua filed with the Arbitrator. The central point of the Bay, as thus fixed, is marked C on the said chart, and is in Latitude 11° 03' 48" North, Longitude 85°43' 30.4" West from Greenwich; taking the summit of Salinas Island to be in Latitude 11° 03' 10" North, Longitude 85° 43' 38" West from Greenwich.~~

4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the Bay of San Juan del Norte from being obstructed , to keep the navigation of the River or Port free and unembarrassed, or to improve it for the common benefit.

5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned.

6. The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, ~~on the River San Juan~~; provided such works of improvement do not result in the occupation or flooding or damage of Costa Rican territory, or in the destruction or serious impairment of the navigation of the said River ~~in~~ or any of

its branches, ~~and~~ at any point ~~more than three English~~
where Costa Rica is entitled to navigate
~~miles below Castillo Viejo, measuring from the exterior~~
said River the same
~~fortifications of the said castle as the same existed
in the year 1858. The Republic of Costa Rica~~ can
~~prevent the Republic of Nicaragua from executing at her
own expense works of improvement in the Bay of San Juan
del Norte.~~ The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.

7. The branch of the River San Juan known as the Colorado River must not be considered as the boundary between the Republics of Costa Rica and Nicaragua in any part of its course.

right of the
8. The Republic of Costa Rica ~~has the same privil-~~
in the ~~right of~~ navigation of
~~eges of navigating~~ the River San Juan with men-of-war
or revenue cutters ~~as civilized nations usually accord~~
as has been hereinbefore determined and
~~in their territorial waters to the public vessels of~~
defined in the second article of this award
~~friendly powers in time of peace; but no other or great-
er privileges.~~

9. The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result in the destruction or serious impairment of the

navigation of the said River ~~in~~ or any of its branches ~~and~~
where Costa Rica is entitled to navigate the same.
at any point ~~more than three English miles below Castillo Viejo, measuring from the exterior fortifications of the said castle as the same existed in the year 1858~~.

10. The Republic of Nicaragua remains bound not to make any grants for canal purposes across her territory without first asking the opinion of the Republic of Costa Rica, as provided in Article VIII of the Treaty of Limits of the fifteenth day of April, one thousand eight hundred and fifty-eight. The natural rights of the Republic of Costa Rica alluded to in the said Stipulation are the rights which, in view of the boundaries fixed by the said Treaty of Limits, she possesses in the soil thereby recognized as belonging exclusively to her; the rights which she possesses in the harbors of San Juan del Norte, and Salinas Bay; and the rights which she possesses in so much of the River San Juan as lies more than three English miles below Castillo Viejo measuring from the exterior fortifications of the said castle as the same existed in the year 1858, and perhaps other rights not here particularly specified. These rights are to be deemed injured in any case where the territory belonging to the Republic of Costa Rica is occupied or flooded, where there is an encroachment upon either of the said harbors injurious to Costa Rica, or where there is such an obstruction or deviation of the River San Juan as to destroy or seriously impair the navigation of the said

River ~~in~~ or any of its branches ~~and~~ at any point ~~more than~~ where Costa Rica is entitled to navigate ~~three English miles below Castillo Viejo measuring from~~ [illegible] [illegible] the same. ~~the exterior fortifications of the said castle as the same existed in the year 1858.~~

[illegible]

11. The Treaty of Limits of the fifteenth day of April, one thousand eight hundred and fifty-eight does not give~~s~~ to the Republic of Costa Rica the right to be a party to grants which Nicaragua may make; though for inter-oceanic canals ~~only~~ in cases where the construction of the canal will involve an ~~appropri-~~ injury to the natural rights of ~~ation or flooding of~~ Costa Rica~~n~~ ~~territory~~, ~~or an en-~~ her ~~the~~ "advice" "[illegible]" mentioned in Article ~~croachment on the harbors of San Juan del Norte or~~ VIII of the Treaty, should ~~[illegible]~~ be more than ~~Salinas Bay, or the destruction or serious impairment~~ "advisory" or "consultative." It would seem ~~of the navigation of the River San Juan in any of its~~ in such cases that her consent is ~~branches and at any point more than three English miles~~ necessary; and that she may ~~[illegible]~~ thereupon ~~below Castillo Viejo measuring from the exterior fort-ifications of the said castle as the same existed in the year 1858. The Republic of Costa Rica has the right to~~ demand ~~such~~ compensation ~~as she chooses~~ for the concessions she is asked to make; but she is not entitled as a right to share in the profits that the Republic of Nicaragua may reserve for herself as a compensation for such favors and privileges as she, in her turn may concede.

In testimony whereof I have hereunto set my hand and have caused the Seal of the United States to be hereunto affixed.

Done in triplicate at the City

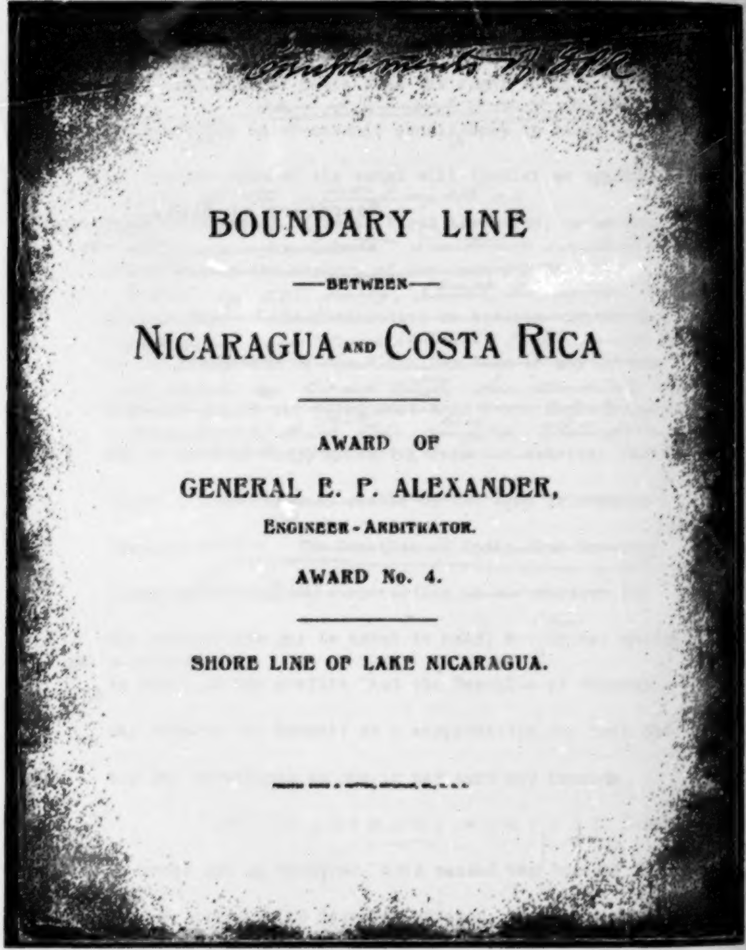
of Washington on the day of in the year one thousand eight hundred and eighty-eight, and of the independence of the United States the one hundred and twelfth.

By the President.

Secretary of State.

Annex 73

ALEXANDER, ENGINEER-ARBITRATOR: AWARD NO. 4. SAN JUAN DEL NORTE, NICARAGUA, 26 JULY 1899



Compliments of E.P.A.

BOUNDARY LINE

—BETWEEN—

NICARAGUA AND COSTA RICA

AWARD OF

GENERAL E. P. ALEXANDER,

ENGINEER - ARBITRATOR.

AWARD No. 4.

SHORE LINE OF LAKE NICARAGUA.

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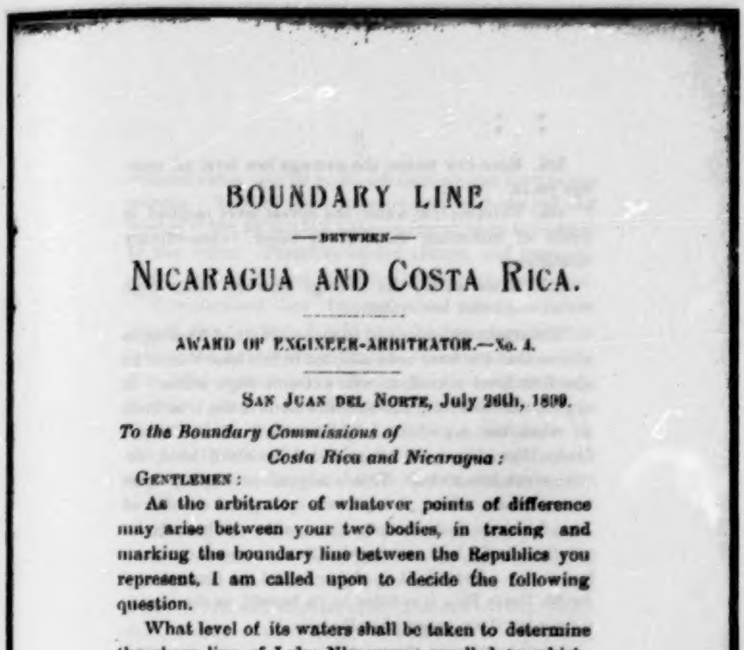


BOUNDARY LINE

—BETWEEN—

NICARAGUA AND COSTA RICA.

AWARD OF ENGINEER-ARBITRATOR.—No. 4.

SAN JUAN DEL NORTE, July 26th, 1899.

To the Boundary Commissions of
Costa Rica and Nicaragua:

GENTLEMEN:

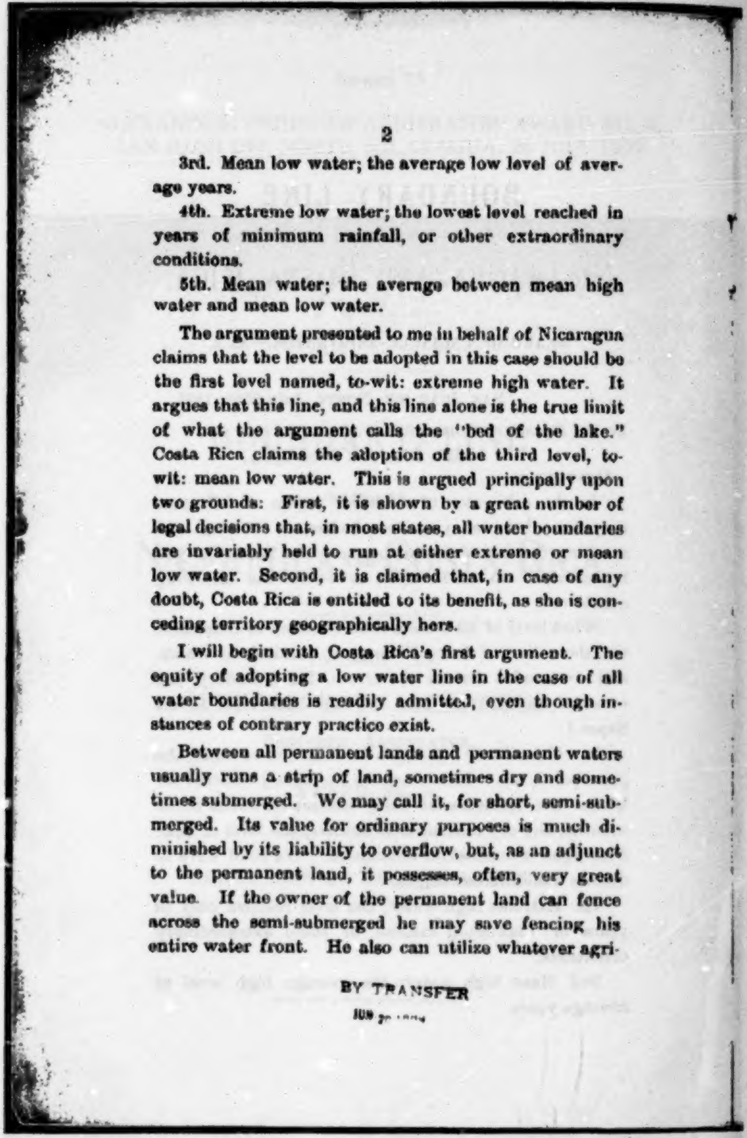
As the arbitrator of whatever points of difference may arise between your two bodies, in tracing and marking the boundary line between the Republics you represent, I am called upon to decide the following question.

What level of its waters shall be taken to determine the shore line of Lake Nicaragua, paralled to which, and two miles distant therefrom, the boundary line must be traced, from near the San Juan river to the Sapoa?

It will facilitate discussion to define, in advance, the principal levels which must be frequently referred to. Under the influence of rainy seasons of about seven months, and dry seasons of about five, the level of Lake Nicaragua is in constant fluctuation. We shall have to discuss five different stages.

1st. Extreme high water; the level reached only in years of maximum rainfall, or some extraordinary conditions.

2nd. Mean high water; the average high level of average years.



2

3rd. Mean low water; the average low level of average years.

4th. Extreme low water; the lowest level reached in years of minimum rainfall, or other extraordinary conditions.

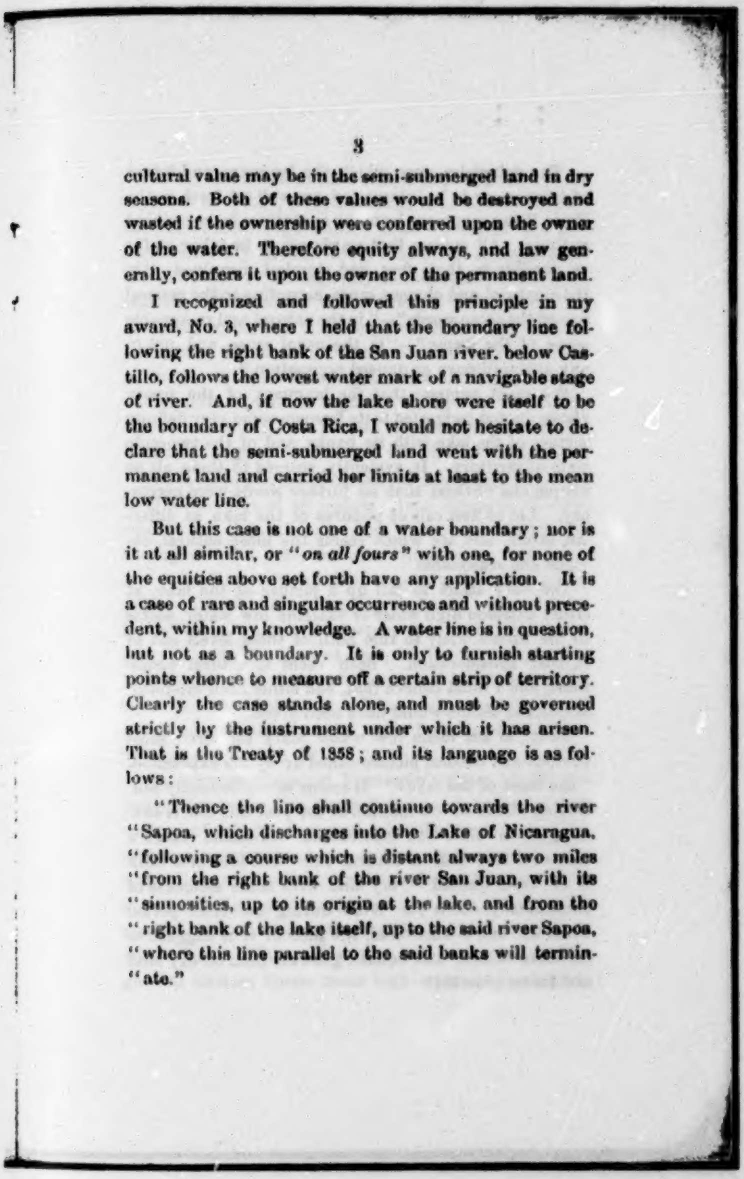
5th. Mean water; the average between mean high water and mean low water.

The argument presented to me in behalf of Nicaragua claims that the level to be adopted in this case should be the first level named, to-wit: extreme high water. It argues that this line, and this line alone is the true limit of what the argument calls the "bed of the lake." Costa Rica claims the adoption of the third level, to-wit: mean low water. This is argued principally upon two grounds: First, it is shown by a great number of legal decisions that, in most states, all water boundaries are invariably held to run at either extreme or mean low water. Second, it is claimed that, in case of any doubt, Costa Rica is entitled to its benefit, as she is conceding territory geographically hers.

I will begin with Costa Rica's first argument. The equity of adopting a low water line in the case of all water boundaries is readily admitted, even though instances of contrary practice exist.

Between all permanent lands and permanent waters usually runs a strip of land, sometimes dry and sometimes submerged. We may call it, for short, semi-submerged. Its value for ordinary purposes is much diminished by its liability to overflow, but, as an adjunct to the permanent land, it possesses, often, very great value. If the owner of the permanent land can fence across the semi-submerged he may save fencing his entire water front. He also can utilize whatever agri-

BY TRANSFER
JUN [illegible]



cultural value may be in the semi-submerged land in dry seasons. Both of these values would be destroyed and wasted if the ownership were conferred upon the owner of the water. Therefore equity always, and law generally, confers it upon the owner of the permanent land.

I recognized and followed this principle in my award, No. 3, where I held that the boundary line following the right bank of the San Juan river. below Castillo, follows the lowest water mark of a navigable stage of river. And, if now the lake shore were itself to be the boundary of Costa Rica, I would not hesitate to declare that the semi-submerged land went with the permanent land and carried her limits at least to the mean low water line.

But this case is not one of a water boundary; nor is it at all similar, or "*on all fours*" with one, for none of the equities above set forth have any application. It is a case of rare and singular occurrence and without precedent, within my knowledge. A water line is in question, but not as a boundary. It is only to furnish starting points whence to measure off a certain strip of territory. Clearly the case stands alone, and must be governed strictly by the instrument under which it has arisen. That is the Treaty of 1858; and its language is as follows:

"Thence the line shall continue towards the river "Sapoa, which discharges into the Lake of Nicaragua, "following a course which is distant always two miles "from the right bank of the river San Juan, with its "sinuosities, up to its origin at the lake, and from the "right bank of the lake itself, up to the said river Sapoa, "where this line parallel to the said banks will terminate."

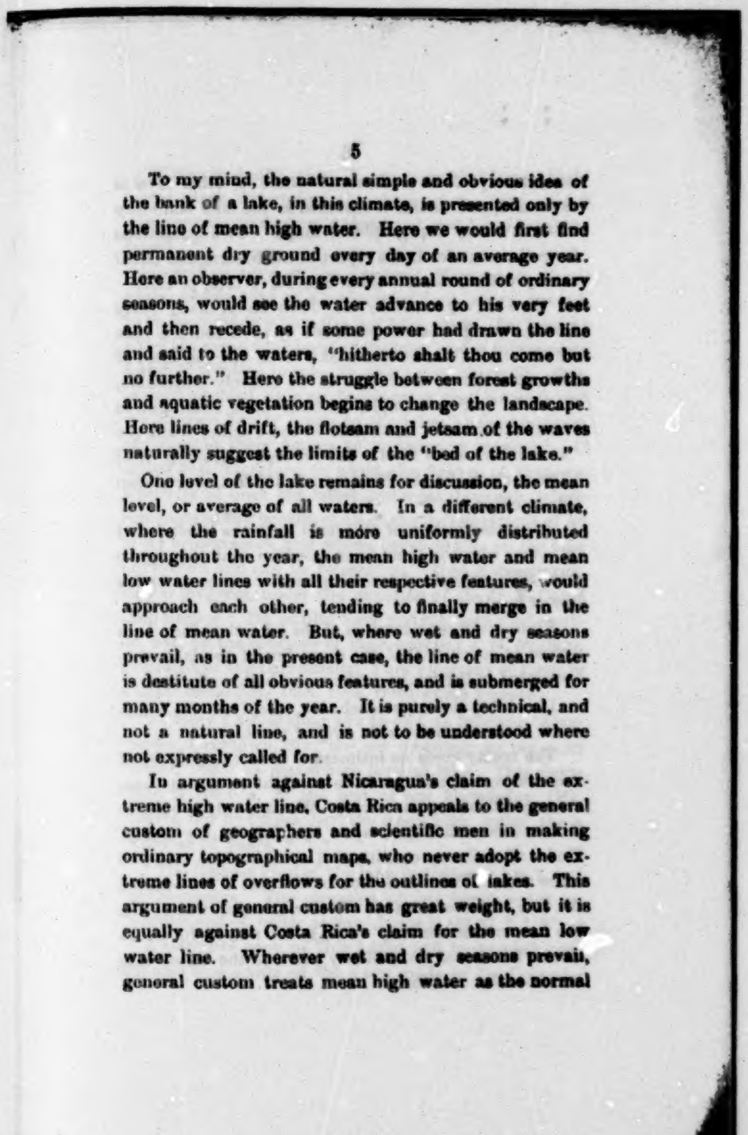
4

The principles upon which the language and intent of treaties are to be interpreted are well set forth in the Costa Rican argument by many quotations from eminent authors. All concur that words are to be taken as far as possible in their first and simplest meanings—"in their natural and obvious sense, according to the general use of the same words"—"in the natural and reasonable sense of the terms"—"in the usual sense, and, not in any extraordinary or unused occupation."

We must suppose that the language of the treaty above quoted suggested to its framers some very definite picture of the lake with its banks, and of the two-mile strip of territory. It, evidently, seemed to them all so simple and obvious that no further words were necessary. Let us first call up pictures of the lake, at different levels, and see which seems the most natural, obvious and reasonable.

The very effort to call up a picture of the lake, at either extreme high water or extreme low water, seems to me immediately to rule both of these levels out of further consideration. Both seem unnatural conditions, and I must believe that, had either been intended, additional details would have been given.

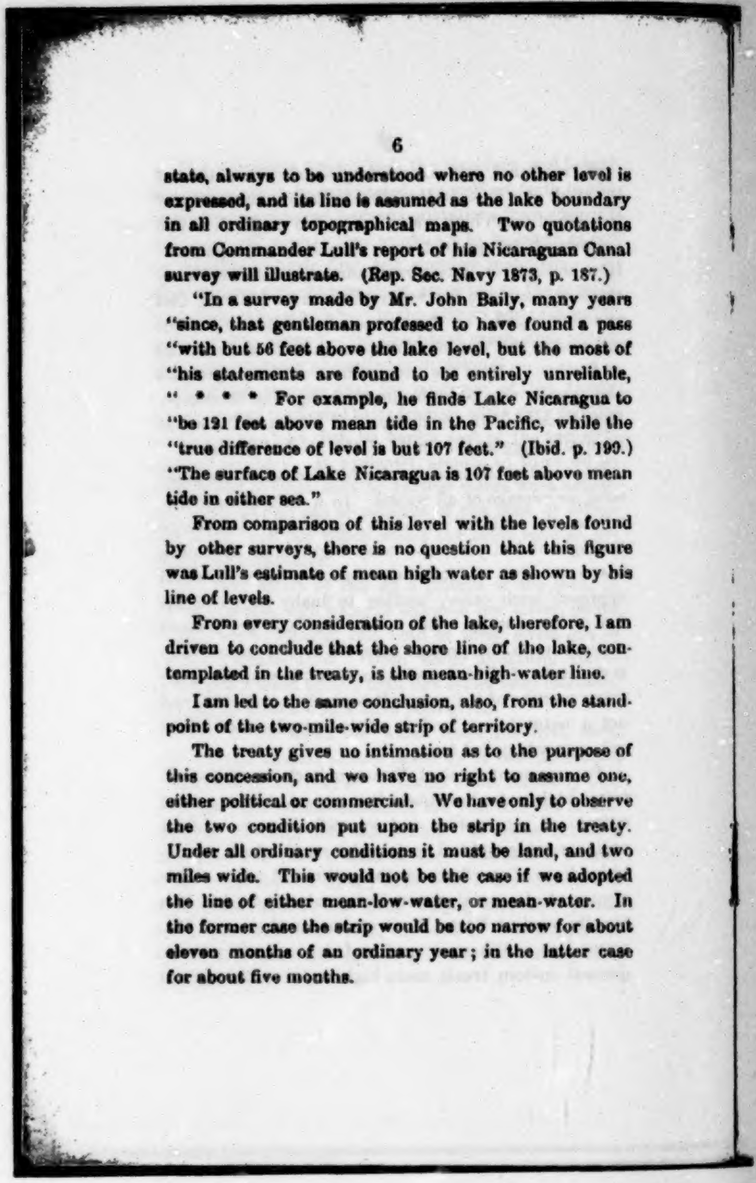
Next; is the mean low water mark the first, most obvious and natural picture called up by the expression, "the bank of the lake?" It seems to me decidedly not. During about eleven months of the year this line is submerged, invisible and inaccessible. It seems rather a technical line than a natural one. The idea of a bank is of water limited by dry land with some elements of permanency about it. Even during the brief period when the line is uncovered, the idea of it is suggestive far more of mud and aquatic growths than of dry land and forest growths.



To my mind, the natural simple and obvious idea of the bank of a lake, in this climate, is presented only by the line of mean high water. Here we would first find permanent dry ground every day of an average year. Here an observer, during every annual round of ordinary seasons, would see the water advance to his very feet and then recede, as if some power had drawn the line and said to the waters, "hitherto shalt thou come but no further." Here the struggle between forest growths and aquatic vegetation begins to change the landscape. Here lines of drift, the flotsam and jetsam of the waves naturally suggest the limits of the "bed of the lake."

One level of the lake remains for discussion, the mean level, or average of all waters. In a different climate, where the rainfall is more uniformly distributed throughout the year, the mean high water and mean low water lines with all their respective features, would approach each other, tending to finally merge in the line of mean water. But, where wet and dry seasons prevail, as in the present case, the line of mean water is destitute of all obvious features, and is submerged for many months of the year. It is purely a technical, and not a natural line, and is not to be understood where not expressly called for.

In argument against Nicaragua's claim of the extreme high water line, Costa Rica appeals to the general custom of geographers and scientific men in making ordinary topographical maps, who never adopt the extreme lines of overflows for the outlines of lakes. This argument of general custom has great weight, but it is equally against Costa Rica's claim for the mean low water line. Wherever wet and dry seasons prevail, general custom treats mean high water as the normal



state, always to be understood where no other level is expressed, and its line is assumed as the lake boundary in all ordinary topographical maps. Two quotations from Commander Lull's report of his Nicaraguan Canal survey will illustrate. (Rep. Sec. Navy 1873, p. 187.)

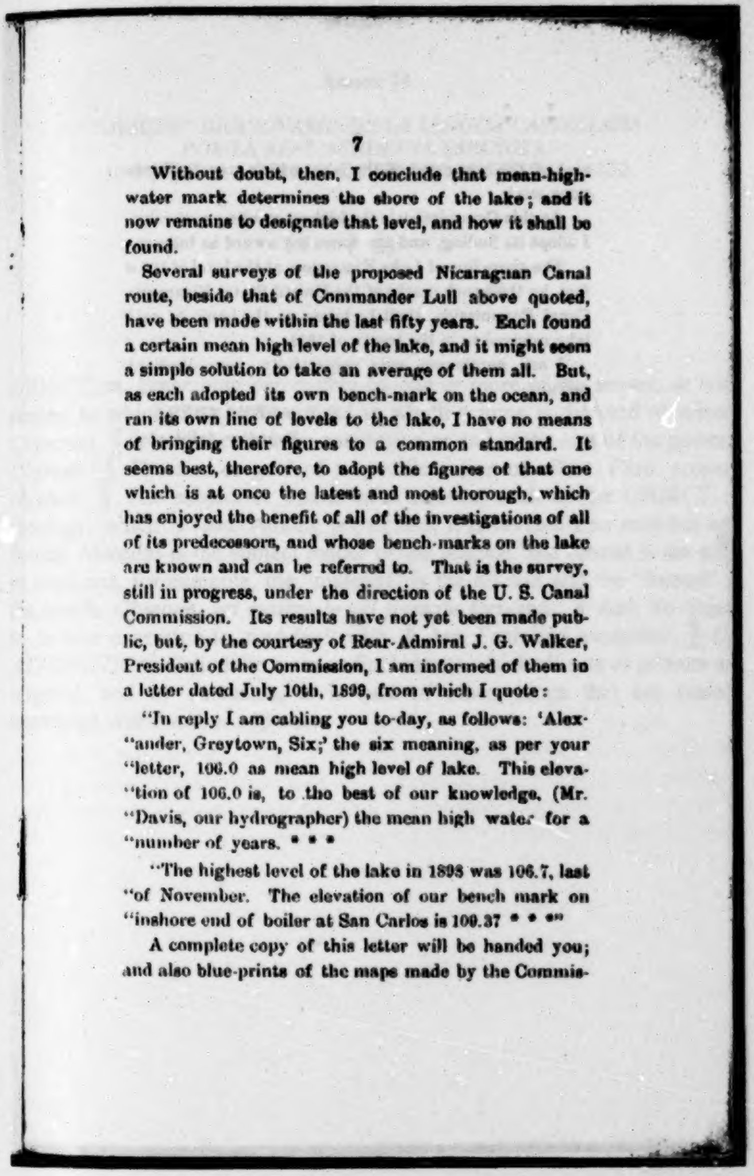
"In a survey made by Mr. John Baily, many years
"since, that gentleman professed to have found a pass
"with but 56 feet above the lake level, but the most of
"his statements are found to be entirely unreliable,
" * * * For example, he finds Lake Nicaragua to
"be 121 feet above mean tide in the Pacific, while the
"true difference of level is but 107 feet." (Ibid. p. 199.)
"The surface of Lake Nicaragua is 107 feet above mean tide in either sea."

From comparison of this level with the levels found by other surveys, there is no question that this figure was Lull's estimate of mean high water as shown by his line of levels.

From every consideration of the lake, therefore, I am driven to conclude that the shore line of the lake, contemplated in the treaty, is the mean-high-water line.

I am led to the same conclusion, also, from the standpoint of the two-mile-wide strip of territory.

The treaty gives no intimation as to the purpose of this concession, and we have no right to assume one, either political or commercial. We have only to observe the two condition put upon the strip in the treaty. Under all ordinary conditions it must be land, and two miles wide. This would not be the case if we adopted the line of either mean-low-water, or mean-water. In the former case the strip would be too narrow for about eleven months of an ordinary year; in the latter case for about five months.



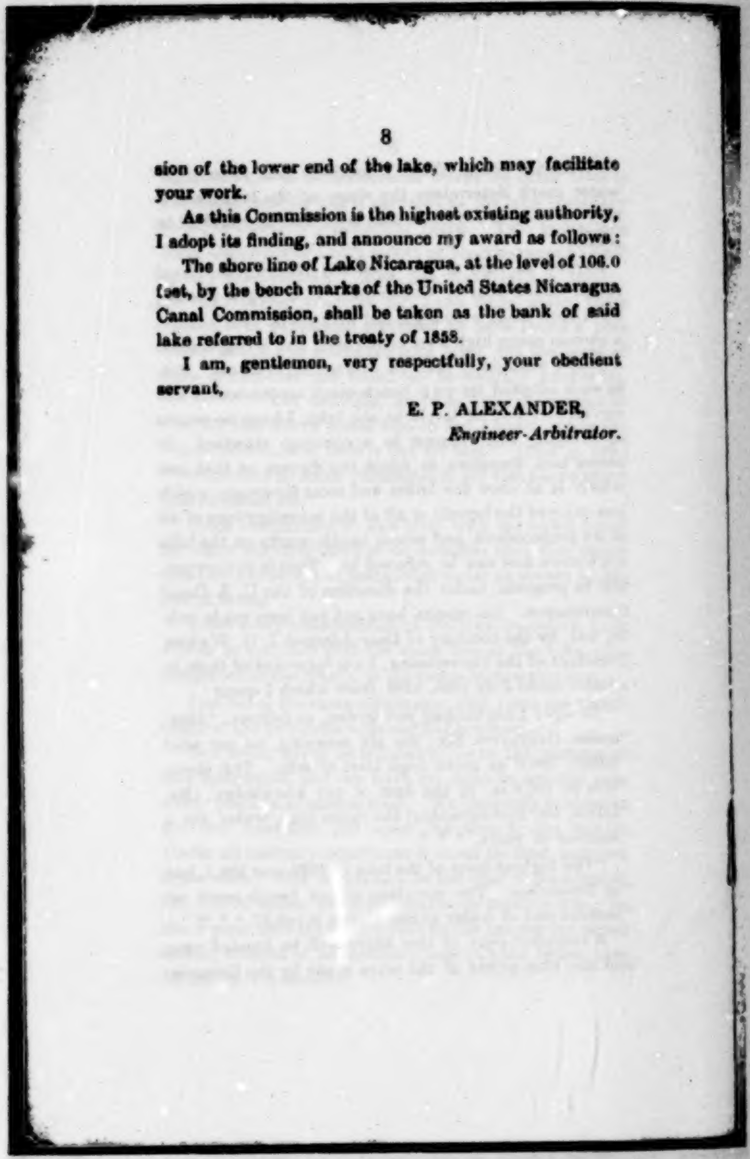
Without doubt, then, I conclude that mean-high-water mark determines the shore of the lake; and it now remains to designate that level, and how it shall be found.

Several surveys of the proposed Nicaraguan Canal route, beside that of Commander Lull above quoted, have been made within the last fifty years. Each found a certain mean high level of the lake, and it might seem a simple solution to take an average of them all. But, as each adopted its own bench-mark on the ocean, and ran its own line of levels to the lake, I have no means of bringing their figures to a common standard. It seems best, therefore, to adopt the figures of that one which is at once the latest and most thorough, which has enjoyed the benefit of all of the investigations of all of its predecessors, and whose bench-marks on the lake are known and can be referred to. That is the survey, still in progress, under the direction of the U. S. Canal Commission. Its results have not yet been made public, but, by the courtesy of Rear-Admiral J. G. Walker, President of the Commission, I am informed of them in a letter dated July 10th, 1899, from which I quote:

"In reply I am cabling you to-day, as follows: 'Alex-
"ander, Greytown, Six;' the six meaning, as per your
"letter, 106.0 as mean high level of lake. This eleva-
"tion of 106.0 is, to the best of our knowledge, (Mr.
"Davis, our hydrographer) the mean high water for a
"number of years. * * *

"The highest level of the lake in 1898 was 106.7, last
"of November. The elevation of our bench mark on
"inshore end of boiler at San Carlos is 109.37 * * *"

A complete copy of this letter will be handed you; and also blue-prints of the maps made by the Commis-



sion of the lower end of the lake, which may facilitate your work.

As this Commission is the highest existing authority, I adopt its finding, and announce my award as follows:

The shore line of Lake Nicaragua, at the level of 106.0 feet, by the bench marks of the United States Nicaragua Canal Commission, shall be taken as the bank of said lake referred to in the treaty of 1858.

I am, gentlemen, very respectfully, your obedient servant,

E. P. ALEXANDER,
Engineer-Arbitrator.

Annex 74

"OBJETO" *DICCIONARIO DE LA LENGUA CASTELLANA POR LA REAL ACADEMIA ESPAÑOLA.*
10 EDICIÓN, MADRID, IMPRENTA NACIONAL, 1852

(....)

OBJECT. m. Something perceptible by one or more of the senses, or with respect to which they are exercised to which a thing is directed or aimed. *Objectum.* ‖ It is also called the conclusion or end of the acts of the powers. *Objetum.* ‖ The aim or goal of a specific action or effort. *Finit. scopus. objetum.* ‖ The subject or matter of a science, such as the OBJECT of theology, which is God. Among physicians, it is divided into material and formal. Material is the subject matter of the science, and formal is the aim; in medicine, for example, the "material" is the disease and the "formal" is the health. *Objetum, vei materiale vel formale facultatis.* ‖ Ant. To object to, to take exception to, find fault with. ‖ Ant. Fault and exception. ‖ *OF ATTRIBUTION.* Called the main or final aim to which all acts or powers are targeted, and by extension, it is said of other things that are mainly attempted. *Attributionis objectum.*

Annex 75

YEARBOOK OF THE MINISTRY OF FOREIGN AFFAIRS OF COSTA RICA. 1888 (PP. 3-4)

(…)

The President of the United States of America, Mr. Grover Cleveland, issued his arbitral award on March 22 of this year, in which he declares the validity of the Treaty of April 15, 1858, and defines the rights of the two Republics as concerns navigation on the San Juan River, concessions for the excavation of the inter-oceanic canal and other important points expressed in the aforesaid award, which document appears among the annexes.

The President of the United States has proven himself worthy of the gratitude of Costa Rica and Nicaragua by accepting the duty that these have entrusted to his erudition and highest respectability; and for having put an end, with his illustrious decision, to the sole motive for disagreement that separated these two countries.

The eminent service provided by the Honorable President of the American Union shall be appreciated more each day because it is to be expected that from this day forward Costa Rica and Nicaragua, for the good of the two peoples, will work united with the same ideals in the enterprises directed to develop their wellbeing and progress.

(…)

Annex 76

YEARBOOK OF THE MINISTRY OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA. 1900 (PP. 10-11)

(...)

This Secretariat is pleased to announce that the setting of boundaries between this Republic and that of Nicaragua will be completed shortly. Two important questions were presented last year to the decision of the Arbitrator: the location of the line parallel to the Lake and the fixing of the terminus of the dividing line at the Bay of Salinas. Both questions were decided according to law by the Honorable General Alexander who, without a doubt, was able to make an accurate interpretation of Mr. Cleveland's award, which established, in a conclusive manner, the intelligence of the Cañas-Jerez Treaty. With respect to the terminus of the line at the Bay of Salinas, it should be noted that it was fixed by the Arbitrator precisely at the place that Costa Rica as always defended, through its various Boundary Commissions, as the center of that Bay. Therefore, it is only necessary to complete the setting of the boundaries, the material work in a relatively small part of the line and to place the markers there.

(...)

Annex 77

DE PERALTA, MANUEL M. *HISTORIA DE LA JURISDICCIÓN TERRITORIAL DE LA REPÚBLICA DE COSTA RICA*.
MADRID, 1891 (P. 38)

Extract

(…)

55. Rodrigo de Contreras, Governor of Nicaragua protested them and filed a claim against Diego Gutiérrez for the part over which he believed he had a right in the Desaguadero. The Council of Indias, after hearing the parties, ruled on March 16, 1541, confirming the terms of the Royal Charter to Diego Gutiérrez. Contreras appealed this sentence and the Council amended it on April 9th next, upholding the power granted to Gutiérrez to enter through the Desaguadero and to occupy and take whatever had not been taken up to fifteen leagues before reaching the lake, but depriving of the navigation and fishing enjoyment in common with the Governor of Nicaragua in the lake and in the fifteen leagues of the river, counted from its origin in the lake. No other objection was made with respect to the Royal Chapter taken with Gutiérrez and, in particular, it is important to mention here that neither the Audience of Panama, nor the Duchy of Veragua protested the provisions of the Crown in favor of Gutiérrez.

(…)

Annex 78

YEARBOOK OF THE MINISTRY OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA.
1998-1999 (P. 35)

[Page 35]

On that same August 12, Chancellor Rojas stated to the press that Costa Rica would seek to exhaust diplomatic means to resolve the conflict, but that if no solution was possible, he would consider a complaint before the International Court of Justice. He announced that the Nicaraguan authorities would be asked to point out the mechanisms that should be employed in the future to sign agreements with Nicaragua because they could not endorse letters that were later questioned. He also ruled out the possibility of taking reprisals against Nicaraguans who illegally reside in Costa Rica. Costa Rican Public Security authorities, on the other hand, announced that navigation by vessels of the Nicaraguan armed forces would be prohibited in the Colorado River, where Nicaragua does not enjoy any right of navigation.

On August 13, President Rodríguez stated that the prohibition imposed by Nicaraguan authorities on free passage of vessels carrying police members with their service arms violated Costa Rica's rights of free navigation in the San Juan River and urged the Nicaraguan Government to settle the disputes through peaceful means.

In statements published by the news agency ACAN-EFE on August 14, 1998, the Vice-President of Nicaragua, Enrique Bolaños, qualified the prohibition on navigation by members of the Costa Rican civil guard in the San Juan River as a prudent measure to avoid incidents with Costa Rica. With respect to the unilateral annulment of the Lizano-Cuadra agreement, Bolaños said that another type of arrangement would be sought to maintain good relations between Central American neighbors and brothers. He also stated that the agreement was annulled because Nicaragua is a Constitutional State and the agreement was unconstitutional.

(...)

Annex 79

YEARBOOK OF THE MINISTRY OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA.
2001-2002 (PP. 143-144)

ANNEXED N°.

PRESS OFFICE CHRONOLOGY OF THE COSTA RICAN DIPLOMACY

… "On 11 January: Chancellor Roberto Rojas, in referring to aspects related to Nicaragua, emphasized that Costa Rica's perpetual rights of free navigation in the San Juan River are those established in the Cañas-Jerez Treaty and clarified by the 1888 Cleveland Arbitral Award. "Costa Rica does not want any right that does not correspond to it according to those international instruments". We know that the national laws cannot be against to International Treaties reason why we trusted that the Congress of Nicaragua - if it is that it is required of an internal law - approves a law that is consistent with the right International", said the Chancellor. And with respect to the actions of administrative return of illegal undocumented people and who carried out the migratory authorities in those days, it emphasized that our country did not have any spirit to mistreat to Nicaragua "… but our authorities are forced to make fulfill the existing legal dispositions in the matter of enter the country of foreigners. This sense, the illegal migrantes can enter the national territory without documents, neither here nor in no country of the world". …"

Annex 80

"NICARAGUA Y COSTA RICA". EDICIÓN DEL CENTROAMERICANO. 24 OCTOBER 1857 (NICARAGUA AND COSTA RICA)

GUATEMALA GAZETTE
Monday, November 23, 1857

[EXTERIOR]

NICARAGUA

(From the *Centro Americano* of October 24)

NICARAGUA AND COSTA RICA

An event of great importance for both countries and perhaps very disastrous for the interests of Central America, will be the object of our weekly tasks. Friends enthusiastic with the reorganization of the country in one single nation, we see with deep sentiment all the steps that tend to alienate the will of the peoples from that grandiose object, and any measures that somehow show that we are incapable of governing ourselves through our own Government, as the enemies of our nationalities continually shout on the press. We have considered that questions of this nature would always exist among brother States, which could translated at the present time as the expression of the perennial rivalries that have always haunted the Central American peoples; and that is why we have demanded the vigorous intervention of all the States in those matters that could affect general interests.

The idea of starting quarrels between brother States in the critical circumstances in which they find themselves; when an active and vigilant enemy is waiting for the smallest pretext to justify its usurpation in these coveted countries; when the entire world has its eyes fixed on these regions, from which it is rightfully expected that the painful lesson they just received will be fruitful in happy results for its political being; such idea, we say, has seemed so strange for us that we have rejected it as proper of an insane person, like an act of suicide in which the person who sadly committed it would drag all those that in some way were connected to his destiny.

But the ill-advised Government of Costa Rica, without stopping to consider the terrible consequences that the spark of a civil war in Central America would have at this time (we cannot give any other qualification to a war between brother States), has engaged in an outburst of hostilities against Nicaragua, making use of the advantages it obtains in the river to obstruct its commerce. Colonel Cauty, on behalf of his government, has called on the Commander of San Carlos to surrender the point that the Government has entrusted to his defense, and later has made the same call to the Governors of Oriente and Mediodia, pieces of which we publicize further below.

Such outrageous conduct on the part of the Costa Rican Government towards Nicaragua, without any precedent to justify its actions, gives the Government of Nicaragua the right to harass Costa Rica by any means, however, knowing that quite often an innocent people is dragged by the imprudence of its leaders to unjustifiable acts, we advise our Government that its hostilities be targeted only to the administration, and is thus compromising with its rash acts the future of the people it governs and of all those in Central America.

Annex 81

"PAÍS OBLIGADO A INTEGRARSE". COSTA RICAN NEWSPAPER *LA NACIÓN*. SAN JOSÉ, 19 MAY 2002 (COUNTRY FORCED TO INTEGRATE)

LA NACION.COM
NATIONAL NEWS

COUNTRY FORCED TO INTEGRATE

Abel Pacheco talks about the "Central American embrace"

(...)

Pacheco to informal dialogue on the river.

President Abel Pacheco does not want, for now, any formal dialogue with Nicaragua to discuss the mess created by the navigation of Costa Rican armed police on the San Juan River.

His argument is that "formalisms arouse distrust, which perverse leaders take advantage of, and we do not want to give room to that", he said yesterday when he confirmed that his next trip to Nicaragua has a date: June 20.

On that Thursday he will informally discuss the issue with Nicaraguan President Enrique Bolaños, who invited him to a festival in Masaya, where they will eat the typical "vigorón" (chicharon with yucca and a salad) and drink "pinolillo".

He will spend the night there and his intention is to have contact with the people because he considers that this is what has been lacking for a long time between the two countries.

The dispute concerning the navigation of Costa Rican police on the San Juan River began in July 1998 when Managua vetoed passage of Costa Rican police with arms.

Since then, a series of bi-national efforts have been made to find a way out, but these have not been unsuccessful.

Yesterday, Pacheco considered that the quarrels must end and we must seek a way out "as civilized people".

He stated that it involves a discussion between brothers where no imperialist threat exists from either of the parties.

"We must understand that it is absurd that a country with no army is fighting over the passage of armed persons on a navigable river that is drying up. So, what's this row about?" asked the President.

Annex 82

"TOVAR RECONOCE SOBERANÍA NICA". NICARAGUAN NEWSPAPER *LA PRENSA*. MANAGUA, 18 FEBRUARY 2005 (TOVAR RECOGNIZES NICARAGUAN SOVEREIGNTY)

LA PRENSA
Tovar recognizes Nicaraguan sovereignty

Assures that President Pacheco was misinterpreted

Ludwin Loáisiga López

Every drop of the river San Juan is Nicaraguan, stated yesterday the Chancellor of Costa Rica, Roberto Tovar Faja, correcting the President of his country, Abel Pacheco, who just three days ago said that his country will maintain sovereignty over this waterway.

"Since 1858 nobody doubted the sovereignty over the river. A drop of the San Juan River is a Nicaraguan drop", stated Tovar after signing a Border Development Program with Nicaraguan Chancellor Norman Caldera.

"The San Juan River is absolutely an inalienable property of Nicaragua," he emphasized.

The question concerning the San Juan River jumped this week to the public scene due to the statements of President Pacheco, who insinuated that sovereignty over these waters also corresponds to Costa Rica.

Tovar assured that the remarks of the Costa Rican President were misinterpreted.

The Costa Rican Chancellor said that the final position of his country comprises three points: the San Juan River is Nicaraguan, it should serve to unit both nations, and that Costa Rica has some rights over those waters.

General Javier Carrion, Head of the Nicaraguan Army, clarified on Wednesday that sovereignty over the San Juan River belongs to Nicaragua and for some time armed Costa Rican delegations were allowed to navigate the river, by way of a bi-national agreement, no longer in effect, for the purpose of combating criminal groups.

Annex 83

COMMUNIQUÉ OF THE MINISTRY OF FOREIGN AFFAIRS AND WORSHIP OF COSTA RICA: "COSTA RICA ANNOUNCES FILING OF APPLICATION, BEFORE THE INTERNATIONAL COURT OF JUSTICE, ON HER RIGHTS OF NAVIGATION ON THE SAN JUAN RIVER".

SAN JOSÉ, 28 SEPTEMBER 2005

Ministry of Foreign Affairs and Worship
Institutional Communication Directorate
TELEPHONE (00 506) 256 65 61 FAX 256 67 37
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The Government of Costa Rica announced today that in the next hours it will submit before the International Court of Justice, headquartered in The Hague, a complaint regarding its navigational rights in the San Juan River, which were granted to her by the pertinent legal instruments.

The decision was announced by the President, Dr. Abel Pacheco de la Espriella, and the Minister of Foreign Affairs and Worship, Roberto Tovar Faja, at a press conference held at the Presidential Office, at 16:00 hours, this Wednesday, September 28, 2005.

The Chancellor explained that today he instructed the Ambassador of Costa Rica, Edgar Ugalde, to submit the complaint before the International Court of Justice, headquartered at The Hague.

The Costa Rican measure will be communicated in the next hours to the Government of Nicaragua through a note that the Minister of Foreign Affairs and Worship of Costa Rica, Roberto Tovar Faja, will remit to the Minister of Foreign Affairs of Nicaragua, Norman Caldera.

The President of Costa Rica, Dr. Abel Pacheco de la Espriella, stated that in spite of the advances and opportunities derived from the Agreement signed by the Chancellors of Costa Rica and Nicaragua on September 26, 2002, "the question concerning Costa Rica's rights in the San Juan River still persists as the only source of dispute between our two countries."

He recalled that the mediation and arbitration mechanisms proposed by Costa Rica were not accepted by Nicaragua. "Consequently, in accordance with the principle of peaceful co-existence between nations and in strict compliance with Costa Rica's tradition to respect international law, we have decided to bring the case to the knowledge of the International Court of Justice."

"We hope that this historical moment will generate authentic national unity", stated President Abel Pacheco, and added that "Costa Rica and its rights are above any particular interest".

On his part, the Costa Rican head of diplomacy stated that Costa Rica comes before "the highest international judicial organ, with the objective of surmounting forever the only source of disagreement with Nicaragua."

He reaffirmed that his country "is not requesting more rights or less rights than those granted to Costa Rica by the pertinent legal instruments."

He stated that "to appear before the International Court of Justice could never signify a disruption of friendship between two peoples. Both Costa Rica and Nicaragua have accepted the Court as a means to guarantee peaceful co-existence and mutual respect between the nations."

"We come before the International Court of Justice in the sincere hope that its eventual decision will contribute to ensure that no reason for discord will ever exist between Costa Rica and Nicaragua", added the Minister of Foreign Affairs.

"I harbor the hope that through this means we will leave future generations a relationship of fraternity and friendship between our countries without causes that affect them. It is our historic responsibility", stated the Minister of Foreign Affairs, Roberto Tovar Faja.

Institutional Communication

(Costa Rica - ICJ - 686)

Wednesday, September 28, 2005.

Annex 84

TEXT FROM THE NATIONAL RADIO AND TELEVISION CHAIN ADDRESSED BY THE PRESIDENT OF THE REPUBLIC [OF COSTA RICA], DR. ABEL PACHECO. 2 OCTOBER 2005

Communication, Information and Press
Presidency of the Republic
Costa Ricans, good evening:

You will recall that at the beginning of this administration, we found that the differences concerning the question of free navigation of Costa Ricans in the San Juan River had not been resolved and, on the contrary, threatened to turn into a conflict of greater scope.

On the other hand, we faced a broad array of possibilities of working together with our northern neighbors to overcome the condition of underdevelopment and poverty that affects our peoples.

Thus, faithful to the way of being of Costa Ricans, we strived for a bilateral understanding on this and other important matters in the relation of the two sister nations, and we gave ourselves a period of three years to reach a definitive agreement on the dispute to settle all our differences.

The agreement that was signed by the Chancellors on September 26, 2002, allowed us to achieve many of the expected goals.

However, upon the expiration of that agreement, a reality is still present, which is the only source of discord between Nicaragua and Costa Rica: the scope of the rights of free navigation that Costa Rica has in the San Juan River, which sovereignty Costa Rica has never questioned and never will object. We well know that the San Juan is Nicaraguan.

To resolve this matter, Costa Rica has proposed mediation or arbitration to Nicaragua on various occasions, but Nicaragua has never accepted these solution mechanisms.

Now, having exhausted the three-year period for seeking a bilateral understanding, and Nicaragua not willing to go to arbitration, we have made the decision that we, Costa Ricans, will present our case and explain our legitimate right to the International Court of Justice, headquartered at The Hague, which is the highest judicial body of the United Nations.

This is a civilized, peaceful and legally correct way to settle disputes among peoples, among nations.

In the past, the Government of Nicaragua has gone there to settle its disputes with other countries.

Thus, there is nothing strange, unfriendly or hostile in this decision of the Costa Rican Government.

It is purely and simply the exercise of a legal action of an international nature, so that independent and objective judges issue a resolution that will forever end the only source of disagreement between the sister nations of Costa Rica and Nicaragua.

We do not ask for more rights, nor accept fewer rights, than those granted to us by the pertinent legal instruments.

Ladies and gentlemen:

Costa Rica and Nicaragua are sister nations, neighboring nations, they both need to continue working together in the struggle to overcome underdevelopment and eradicate poverty that prevails especially in the border zone.

We have significantly advanced in the integration process with the other nations of the region and it is necessary that we continue on this path.

In Costa Rica, there are important companies with Nicaraguan capital, while important national companies are engaged in productive activities in our sister nation.

Our commercial flows are important for the economies of both countries.

We have made important strides in the development of the objectives of the Plan Puebla-Panama and we have in process a Free Trade Agreement with the United States, Central America and the Dominican Republic, as well as negotiations with the European Union for a similar agreement, and already we anticipate similar alliances with Japan, China and MERCOSUR, so it is not a time for disputes.

Neither are retaliations necessary nor appropriate, nor antagonism between peoples who are brothers.

In addition to geography, in addition to history, we are united by common challenges, opportunities that we should jointly take advantage of, and a world that sees Central America as a single block.

Therefore, an issue –that will be resolved through the application of international law instruments– should not affect the friendship between two peoples nor the bi-national and regional work that we must push forward in an effort to achieve the highest levels of human development for our two nations.

I ask Costa Ricans to behave as we always have done; with prudence, with good judgment, with respect and with great faith in justice.

I call upon our Nicaraguan brothers to act with prudence and good judgment, and to work together as a way for achieving better living conditions for both countries, which they both deserve.

May God bless the homes of our two nations.

Annex 85

"GOBIERNO DESECHARÁ ARMAS DE GUERRA". PERIÓDICO *LA NACIÓN*, SAN JOSÉ, 6 JUNE 2006 (GOVERNMENT WILL DESTROY ITS MILITARY ARMAMENT)

Nicholas Aguilar R. **naguilar@nacion.com**

The Government will sell or destroy its military armament, namely the M-16 guns that the Public Force currently has, announced the Minister of Public Security yesterday, Fernando Berrocal.

"We do not need military arms not even to protect the borders. It is necessary to change them by official police guns", expressed the Minister Berrocal when recognizing that he must "take a decision" in a short time.

Berrocal made this declaration after the recovery of 15 M-16 guns robbed in a police delegation in Guácimo, Limon, the previous week.
The M-16 are military armament donated to the Public Force several years ago.

Those guns were constructed in the sixties. The United States troops used them in the war of Vietnam.

Not more for the Police.

Berrocal reiterated that the Police must not have those arms. "It seems to me a barbarism that in a delegation as the one of Guácimo were 15 M-16".

According to his declarations, he has already asked the Director of the national arsenal a report on the armament distributed in the police posts of the whole country to determine how many arms are for a military use and to gather them for their destruction, sale or storage.

He added: "we are going bring many of those arms to the arsenal and we will leave some in the regional Directions of the Public Force, only those that are needed".

The M-16 can perforate bullet-proof helmets and vests. It is an assault rifle that uses the Armed Forces of the United States.

Minister Berrocal stressed that "there is a great amount of arms that do not comply the requirements of a civilist police". Therefore, he did not discard to sell them to save funds that allow to acquire "police arms".

"We did not need military arms, never", emphasized the holder of Public Security.

Annex 86

ROYAL CHARTER TO DIEGO ARTIEDA.
EL PARDO, 1 DECEMBER 1573

[fol. 44 v.]
The King

Royal Charter with Captain
Diego de Artieda

Corrected

WHEREAS you, Captain Diego de Artieda, being desirous of serving Our Lord God, and with the intent that the Holy Catholic Faith and evangelical law be propagated, and our Crown, revenues and Royal patrimony be enlarged, have proposed and have resolved to go, in our name and at our expense, to discover and colonize the province called Costa Rica, in our Indias in the Ocean Sea, and that you will endeavor in all possible ways to bring the native Indians of that land to an understanding of our true God, and to our submission and obedience; and you have pleaded that we give you license to do this, and in that respect, we have mandated a royal writ and Royal Charter be drawn. And having been read by the members of our Council of the Indies, in keeping with the aforesaid, and our earnest desire for the conversion and instruction of the Indians of the said province, and that our Holy Catholic Faith and evangelical law be preached and taught to them so they may be saved, we have considered and consider it fit, and have agreed to make and grant to you, for the said discovery, colonization and pacification, a royal writ, Royal Charter and accord in the following manner:

[I] Firstly, you, Captain Diego de Artieda, offer to discover, settle and pacify the said province of Costa Rica, at your own expense and mission, without obliging us to come to your aid with any other thing from our Treasury to help you in that respect; and that you will spend and are to expend twenty thousand ducats; and that to go on the said discovery, you will have in the ports of Sanlúcar de Barrameda or Cadiz, during the entire month of January first ensuing in the year one thousand five hundred and seventy-four, or no later than [fol. 45] at the end of the month of April of said year, three vessels, two of high-board, and the other a galley, frigate or caravel, sufficient for navigation; and that all three vessels will have a carriage of up to four hundred and fifty tons, with the best possible caulking, outfitted with artillery and equipped with sails, rigging, cables, anchors and mariners and seamen as may be necessary for your service and government, and all the rest that may necessary for them; and that you will be ready to set sails and begin your voyage with one of the fleets that went to the mainland or New Spain in the year seventy-four.

(...)

[II] 2 – Moreover, you have offered, for the said purpose, to make and gather in these our Kingdoms, and to take on the said vessels to the said province of Costa Rica, at least two hundred men, a hundred of them married, and all useful for the said discovery, colonization and pacification; and that you will have them together and ready to set sail at one of the said ports of Sanlúcar or Cadiz by the end of the month of April first ensuing, as aforesaid, each equipped with the necessary and convenient weapons, such as swords, daggers, harquebus, ballasts, helmets, bucklers, lances and whatever else may be necessary for the journey.

(...)

[V] 5 – And after the said three vessels have been visited and are ready as aforesaid, you offer to leave, with the help of God, from one of the said ports and to go with the said vessels and people and supplies, together with one of the said fleets from the mainland or New Spain, whichever left first on the said next year of one thousand five hundred and seventy-four, with everything in good order for the said discovery, colonization and pacification, and well armed and ready for war, and to take your course to the said province of Costa Rica.

[fol. 46]

And once you arrive there, you offer to discover the entire coast of the said province, from the mouths of the *Desaguadero* to the confines of Veragua, in the North Sea, and that you will take possession on Our behalf of whatever has not been taken; and you will discover all the inland of the said province up to the South Sea, from the place called Chomos, from where the province that corresponding to the part of Guatemala takes its name, straight to the valleys of Chiriquí, until you reach the said province of Veragua; and you will populate three towns in the said province of Costa Rica, one of which will be provincial and the other two suffragan, in the most comfortable, fertile, abundant and necessary parts, so that the colonization and pacification of the said province may proceed from there; one of which will be at the port of Bocas del Drago, in the North Sea of the said province; and if you should deem it is not convenient to make and populate the said town there for any just causes, you will populate it in another of the seaports on the said coast, where it may be more necessary, convenient and useful for the population of the said province, treatment and trade of the Spaniards, and people residing therein; and the second of the said three cities you will populate in the mediterranean of the said province, in the valley [fol. 46 v.] of Guarco; and the other in the province of Garavito, or in another more comfortable part on the shores of the South Sea.

(...)

[XII] 12 –Firstly, we give you license and authority to discover, settle and pacify the aforesaid Province of Costa Rica and other lands and provinces contained therein, from the North Sea to the South Sea in latitude and in longitude from the border of Nicaragua in the Province of Nicoya, straight to the valleys of Chiriquí, up to the Province of Veragua, on the southern part, and on the northern part, from the mouths of the Desaguadero, that belong to Nicaragua, all across the land, to the Province of Veragua. And we bestow upon you the Governorship and Captaincy General of the said province of Costa Rica and of all the other lands comprised therein, as aforesaid; for the rest of your life, and of your son or heir, or person that you may appoint; with a salary of two thousand ducats per year, which amount is to be paid you out of the rentals and revenues pertaining to us in the said province, and if there were none, we will not be obliged to pay you [fol. 48 v.] any part of the said salary; and for that, we will mandate that title and necessary instructions be given to you.

(...)

(XL) 40 – Moreover, we offer you, Captain Artieda, that after you have fulfilled this writ and Royal Charter, as you have offered, we will take into account your services to honor you and give you vassals in perpetuity and the title of Marquis or another.

Therefore, after you, Captain Diego de Artieda, have fulfilled the contents of this royal Charter in the manner that you have offered, and the instructions and provision that we give you and hereinafter mandate be given to you for the said province and settlement therein and for the good treatment and conversion and doctrine of the Indians, we hereby promise you and assure on our faith and Royal word, that whatever you need from us we will mandate be kept and complied; and that it not be contravened or breached in any way, provided that if you do not fulfill what you have offered, as aforesaid, we will not be obliged to mandate that anything of the aforesaid be kept, but rather we will mandate that you be punished and action be taken against you like any person who does not keep and comply with the mandates of his King and natural Lord; and for your security, we have mandated that the present be issued, signed by our hand, rubricated by our Secretary Antonio de Eraso and issued by those of our said Council (fol. 54) of the Indias. Done at El Pardo, on the first day of December of one thousand five hundred and seventy-three. I THE KING. Rubricated by Antonio de Eraso. Issued by the President Juan de Ovando, Licentiate Castro, Mr. Gómez Zapata, Licentiate Botello Otalora, Gasca, Gamboa and doctor Santillán and Licentiate Espadero.

Annex 87

MR. FRANCISCO MARIA OREAMUNO, DIPLOMATIC MISSION IN NICARAGUA (INSTRUCTIONS).

SAN JOSÉ, 26 JULY 1838

Instructions carried by the special Minister appointed to the Government of Nicaragua.

1st Celebrating an express and mutual recognition of both States independence, sovereignty and liberty, perpetually delimiting their territory dividing line and providing for the mutual exchange of defendants and Treasury debtors, regardless of their nature and residence, who are claimed by the competent authority.

2nd Celebrating, as a result, the closest friendship between Nicaragua and Costa Rica and pledging mutual defense of their reciprocal independence, sovereignty,and liberty, specifying the relief supplies to be provided by sea and land, in the case of being invaded by foreigners or by any other States of the Republic, or by any person trying to depress such rights by force and under nationality denomination or character.

3rd Establishing the obligation of actively cooperating in the creation of a general government, preserving and sustaining it, contributing to its expenses with a proportional allotment, and recognizing the national debt and also contributing to its amortization in a proportional manner.

4th Establishing principles to help each other when legitimate respective authorities are disowned or attacked by internal factions.

5th Requesting the cooperation of the Government of Nicaragua for the diocesan chapter to authorize a capitular vicar in the spiritual jurisdiction of Costa Rica, with the same powers possessed by the Nicaraguan vicar and reporting only to said chapter; and for the chapter to give its express consent concerning the diocese division, specifying the involvement this Government should have in appointing clergymen and capitulars while the bishopry for Costa Rica is provided.

6th Establishing both States' reciprocal obligation of fixing the main road leading from one to the other to their respective borders, without levying traffic on it.

7th Since a tobacco contract was entered into by that Government and this one in the year 823, acccording to which the former still owes a certain amount, he will previously settle the account and through the corresponding installments will collect the remainder.

8th He will similarly claim the indigenous community funds belonging to this State and existing in times of the Spanish Government at the Nicaraguan Government's general treasury.

9th He will also claim the rustic and urban farm sales taxes, which, located in this State and sold by neighbors and residents of that one, have been paid there.

10th He will additionally ask for payment of obligations the late Pedro Muñoz and his creditors assumed in the State of Nicaragua upon Nicoya district tithe auction sales, in the three-year period elapsed after its annexation to Costa Rica.

11th Similarly, he will ask for the armament which former Chief Cerda took away in the year 27 from the Costa Rican division that was returning from the national army, along with with gear it was bringing, or otherwise he will determine an indemnity payment.

12th After these debts have been acknowledged, the Minister may grant terms for repayment of the amount owed to this State by the Nicaraguan State on account of the tobacco contract entered into in the year 23, the indigenous communities, and the indemnity for the armament taken away in Managua.

13th He will also be able to compromise and conform in reference to the late Pedro Muñoz's debt, resulting from Nicoya district tithe auction sales, referred to in the tenth paragraph of these instructions, and by the sales taxes paid so far, as mentioned in the ninth instruction.

14th He will ask for new instructions on any new incidents or propositions on matters not covered in the preceding articles, providing extensive information on related issues.

15th Concerning the treaties he enters into, the Minister will not leave until he receives their ratification or reforms for him to stipulate them, unless an unforeseen and very dangerous event forces him to leave before completing his mission, in which case he will render account through an express dispatch: and if unfortunately he should become sick and seriously ill, he will pass on these instructions and the files documenting them to the secretary, who shall keep them while expecting orders before returning.

16th In all businesses concerning the mission, the secretary will authorize communications with the Government of Nicaragua and with this one. He will also authorize the treaties, pacts, or agreements entered into.

17th He will set down Costa Rica's freedom to navigate on the San Juan River and its freedom from export duties on its fruits leaving through the same river, since its territory contains the Sarapiquí River, the water of which increases the San Juan River flow. If necessary, this covenant shall include the prohibition of introducing foreign goods or merchandise to Costa Rica through the same waterway, in case entered goods could not be registered to pay duties at this State customs: and a fifth, fourth, or third of the annual liquid returns in favor of Nicaragua may be agreed upon, providing exports are done freely.

Given in the city of San José, on the twenty sixth day of the month of July, eighteen hundred and thirty eight.

(Signature of Mr. Braulio Carrillo, Chief of State)

Reserved instructions in addition to those given on this date to the Minister appointed to the Government of Nicaragua.[1]

1st On the first instruction, it should be borne in mind that State sovereignty should know no other limits but those established by public international law between independent nations, and that their freedom is so vast they can become politically organized as they deem it best. In demarcating the dividing line it should also be considered that Costa Rica owns the Nicoya District, and thus the dividing line should go from La Flor to the right banks of the San Juan River, this being the river flowing from Lake Nicaragua to its mouth on the Atlantic: its right bank, dowstream to the sea, should be recognized as belonging to Costa Rica, even though the waters belong to Nicaragua; the same recognition should be made with respect to the coast, from the San Juan River mouth to Escudo de Veraguas; and on the South from the gulf of Papagayo, at La Flor, to the Chiriquí River. For the purposes of exchanging persons convicted of crimes committed in the territory of one State and at large in other, and for Treasury debtors, the competent authority for claiming them may be either the Superior Court of

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Justice or the Supreme Chief of State; but if the latter is the claimant it should do it through its minister of Justice to the Chief of the petitioned State; and if the Court is the claimant, it should do it through its secretary to the Court of the petitioned State through its secretary; and no more formalities should be required in either case.

2nd In the second instruction it should be considered that Costa Rica is not encumbered by expensive obligations, bearing in mind it cannot by now fear anything from the interior of the Republic nor from abroad, because it has no quarrel with anybody: and that concerning this provision, it would be desirable to determine as much as possible the relief supplies, with the assisted State being obliged to pay them back after a fair settlement.

3rd As to the third instruction, in providing for the creation of a general government, it should be kept in mind that revenues so far known as federal should now accrue to the States: and for national debt repayment the population base should be used as the basis for apportionment.

4th On provisions concerning the fourth instruction, request for relief supplies should be made by the legitimate authority, and relief should not be granted without this requirement.

5th Concerning the fifth instruction, in order to get the possible advantages, the Minister will get directly in touch with the cathedral chapter, after securing Government cooperation; and in case the chapter absolutely refuses its express consent for dividing the diocese, or if it refuses to authorize a State Government-appointed clergyman with capitular vicar powers, the Minister will also refuse State contribution through ecclesiatical revenues to maintain the Nicaraguan miter and cathedral chapter. On this matter, he will also be able to file with the Nicaraguan constituent assembly a request for it to recognize the diocese division, acknowledging Costa Rica's justice and rights.

6th While there is no document at our office, it has been claimed the debt from the tobacco contract entered into in the year 823 between this Government and those of Granada and León was transferred to the national Government; therefore, since this business will be dealt with all the needed slyness and cleverness, provided he will reject the above-mentioned transfer, the corresponding vouchers will be required, and if they are authentic the solvency proofs will be required; and since this will not be produced, the transfer will be revoked so Nicaragua will acknowledge this debt in favor of Costa Rica.

7th If the Government of Nicaragua should promote a tobacco contract, the Minister shall welcome proposals made and will render account on them, reporting what is convenient, and telling that Government that this Government shall instruct him on the matter, and that this being a long-term contract there will be no difficulties in entering into it.

8th If an advantageous outcome is secured for Costa Rica on the first six public instructions, the Minister may be generous concerning the claims; that is to say, splitting the tithe debt, splitting or waiving the sales tax debt, granting long terms and no interests on the tobacco and community debts; and should the Government of Nicaragua promote the reincorporation of the Nicoya District, or openly refuse to recognize the dividing line established in the first of these instructions, the Minister will be able to waive half, two thirds, or even the entire debt, if necessary; but acting in such a way that the decided endeavor or interest in keeping the department is not known: waiting, prudence, and cunning, without detriment to good faith and decorum, are very sound bases in achieving a good result.

9th Public instructions will be reserved for the ultimate case of an inevitable commitment, cleverly making believe that his mission only consists of settling several accounts; but that he will enter into other negotiations convinced of the good disposition of this Government and its wishes for harmonizing in all manners with the Government of Nicaragua.

10th These instructions shall be well guarded, and only the secretary shall be able to register them when the interest of the negotiation so requires it, making him aware that they are of a reserved nature in the case referred to at the end of the fifteenth public instruction.

Given in the city of San José, on the 26th of the month of July, 838.

(Signature of Chief Carrillo)

Annex 88

PROPOSITIONS WEBSTER-CRAMPTON.
WASHINGTON, 30 APRIL 1852

The Undersigned Daniel Webster Secretary of State of the United States and John F. Crampton Envoy Extraordinary and Minister Plenipotentiary of Her Britannick Majesty having taken into consideration the state of the relations between the Republics of Costa Rica and Nicaragua in respect to the boundaries between those Republics and between the Republic of Nicaragua and the territory claimed by the Mosquito Indians and being mutually desirous that all pending differences respecting those questions should be amicably, honorably and definitively adjusted do in behalf of their respective Governments earnestly recommend to the respective Governments of the Republics of Nicaragua and Costa Rica an accommodation and settlement of these differences upon the following Basis.

ARTICLE I

The Mosquito Indians may reserve to themselves out of the territory heretofore claimed or occupied by them on the Eastern Coast of Central America a district of country and the jurisdiction over the same to be bounded as follows namely beginning on the shore of the Caribbean Sea at the mouth of the River Rama which is (according to Bailey's map of Central America published in London November 1850) 11°34m north latitude and 83°46m West Longitude running thence due West to the meridian of 84°30m West Longitude from Greenwich thence due north on said meridian to the river Segovia Fantasma or Wanz thence down said river to the Caribbean Sea thence southerly along the shore of said sea to the place of beginning and all the rest and remainder of the territory and lands lying Southerly or Westerly of said reservation heretofore occupied or claimed by the said Mosquitos including Greytown they shall relinquish and cede to the Republic of Nicaragua together with all jurisdiction over the same in consideration of the nett receipts for a period of three years from all duties levied and collected at Greytown at the rate of ten per cent ad valorem on all goods imported into the state—The period of three years to commence on the day when Nicaragua shall formally take possession of and enter into the occupancy of said Town.— And the said nett receipts shall be payable quarterly or every three months to such agent or agents as may be appointed to recieve them.

And the said Republic of Nicaragua hereby agrees not in any way to molest or interfere with the Mosquito Indians within the territory herein reserved by them—

It is also understood that any Grants of land which may have been made by said Mosquitos since the first of January 1848 in that part of the Mosquito territory hereby ceded to Nicaragua shall not be disturbed provided the said Grants shall not interfere with other legal grants made previously to that date by Spain by the Central American Confederation or by Nicaragua or with the privileges or operations of the Atlantic Ship Canal Company or Accessory Transit Company and shall not include territory desired by the Nicaraguan Govt for forts arsenals or other public buildings—

ARTICLE II

It is also understood that nothing in the preceding article shall preclude the conclusion of such voluntary compact and arrangement between the state of Nicaragua and the Mosquito Indians by which the latter may be definitively incorporated and united with the state of Nicaragua, it being stipulated that in such case the said Mosquito Indians shall enjoy the same rights and be liable to the same duties as the other citizens of the said state of Nicaragua— The municipal and public authority in the town of Grey-Town shall be held and exercised by the Government of Nicaragua but said Government shall lay no duties of tonnage nor any duties of impost on goods imported into Greytown intended for transit across the isthmus or for consumption in any other state than that of Nicaragua except such tonnage duty as may be necessary for the preservation of the Port and Harbour and the erection and maintenance of necessary light houses and beacons—And no duty for this or similar purposes shall exceed say 12 cents per ton on each vessel.

ARTICLE III

The boundary between the Republics of Nicaragua and Costa Rica shall begin on the South Bank of the Colorado at its confluence with the sea at high water mark on said river thence along said South Bank also at high water mark to the confluence of the Colorado with the river San Juan thence at hight water mark along the South Bank of the San Juan to its source on lake Nicaragua thence at high water mark along the South and West Shore of that lake to the point nearest the mouth of the river La Flor River thece by a direct line drawn from that point to the mouth of the said river in the Pacific Ocean-- It is understood however that Costa Rica retains the right in common with Nicaragua to navigate said rivers and lake by sail vessels, barges or vessels towed but not by steam but this right is in no wise to interfere with the paramount right in Nicaragua or her grantees to appropriate the waters of said rivers and lake to a ship canal from Ocean to Ocean or from the Caribbean Sea to said lake— It is also understood that the Company entitled the American Atlantic and Pacific Ship Canal Company shall have the privilege of locating on the south bank of the St John river four of the eight stations or sections of land referred to in the 27th Article of the amended charter of said Company as ratified by the Government of Nicaragua on the 11th April 1850— If however the said Company should desire to locate more than the said four sections on the south side of the San Juan, the Governments of Nicaragua and Costa Rica will amicably agree in regard to the terms of such location.

ARTICLE IV

Neither the Government of Nicaragua nor the Government of Costa Rica shall be at liberty to erect or suffer to be erected any wharf wall embankment or other structure, or to do or suffer to be done any act or thing whatever in the harbor of Greytown in any part of the Colorado or San Juan rivers or on the shore of Lake Nicaragua which shall obstruct the free operations of the ship canal or Transit company or hinder the passage of their boats in, along and through the said harbor of Greytown and rivers Colorado or San Juan— And if after a proper survey of the route for a Ship Canal between the two oceans it shall be found that it would be preferable for that canal to pass in part along the Southern Bank of the river San Juan or the Colorado river the Government of Costa Rica engages to grant any lands and to afford any facilities which may be necessary for the construction of the said canal.

ARTICLE V

Whereas it is stipulated by the second article of the Convention between Great Britain and the United States of America concluded at Washington on the nineteenth day of April 1850 that vessels of the United States or Great Britain traversing the said Canal shall in case of War between the contracting parties be exempt from blockade detention or capture by either of the belligerents and that that provision should extend to such a distance from the two ends of the said Canal as might thereafter be found expedient to establish— Now for the purpose of establishing such distance within which the vessels of either of said nations shall be exempt from blockade, detention or capture by either of the belligerents, it is hereby declared that it shall extend to all waters within the distance of twenty five nautical miles from the termination of said Canal on the Pacific and on the Atlantic coasts.

ARTICLE VI

Whereas by the seventh article of the said Convention it was among other things stipulated that if any persons or company had already made with any state through which the proposed Ship Canal might pass "a contract for the construction of such o canal as that specified in said Convention to the stipulations of which contract neither of the contracting parties in that Convention had any just cause to object and the said persons or Company had moreover made preparations and expended time money and trouble on the faith of such contract it was thereby agreed that such persons or Company should have a priority of claim over every other person persons or company to the protection of the Government of the United States and Great Britain and should be allowed a year from the date of the exchange of ratifications of that Convention for concluding their arrangements and presenting evidence of sufficient capital subscribed to accomplish the contemplated undertaking it being understood that if at the expiration of the aforesaid period such persons or Company should not be able to commence and carry out the proposed enterprise than the Governments of the United States and Great Britain should be free to afford their protection to any other persons or Company that should be prepared to commence and proceed with the construction of the Canal in question,—And whereas at the time of the signature of the said Convention a company styled the American Atlantic and Pacific Ship Canal Company had with the Government of the Republic of Nicaragua a contract for constructing a Ship Canal between the said Oceans but for reasons deemed sufficient by the Govts of Great Britain and the United States have not hitherto been able to comply with the stipulation which gave them a claim to the protection of the said Governments. And whereas no other Company has claimed such protection on the same conditions it is therefore agreed that the further time of one year from the exchange of the ratifications of this Convention shall be allowed the said Company to comply with the stipulation aforesaid—

ARTICLE VII

And whereas by another Charter of the 11th April 1850 to the American Atlantic and Pacific Ship Canal Company the state of Nicaragua with a view to facilitate the construction of that Canal has authorized the said Company to separate from their contract of the 22^d of Sept 1849 the part relating to the navigation of the waters of Nicaragua by steam under the title of the Accessory Transit Company and whereas the said Accessory Transit Company has for some time past been in full and successful operation the Governments of Great Britain and of the United States hereby engage to extend their protection to the said Accessory

Transit Company in the same manner and to the same extent as by the aforesaid Convention of the 19th April 1850 and by this Convention the said protection is extended to the Atlantic and Pacific Ship Canal Company but as the main object of the said Convention—between Great Britain and the United States of America was to provide for an inter Oceanic Ship Canal between the Atlantic and Pacific and as that object is still deemed paramount to every other mode of transit the protection hereby extended to the Accessory Transit Company shall not be construed to interfere with the right to construct said Canal by the Company which has undertaken to construct the same or in case of their failure by any other person or Company which may be authorized to construct the same and every Grant and privilege conferred upon said Accessory Transit Company shall be subject to the paramount right and privilege of any other persons or Company to construct maintain and use such Canal— Finally these propositions so far as they respect the Governments of Nicaragua and Costa Rica are advisory and recommendatory and the immediate attention of those Governments to their consideration is earnestly invoked— To insure a prompt decision Mr. Wyke Consul General of Her Britannick Majesty clothed with full power for that purpose, Mr. Kerr Chargé d'Affaires of the United States to Nicaragua and Mr. R. M. Walsh, appointed Special Agent on the part of the United States to the Government of Costa Rica are authorized to communicate the arrangement proposed to those Governments respectively and unless the aforesaid Governments of Nicaragua and Costa Rica shall promptly and without unnecessary loss of time concur in the general Basis of this arrangement and adopt proper measures for carrying it into effect then the Governments of Great Britain and the United States will immediately as between themselves jointly adopt such measures as they shall deem advisable to carry into full execution the Convention between those Governments of 19th April 1850 and to accomplish the design therein contemplated of an inter-oceanic communication by Canal from the Atlantic to the Pacific Oceans by the way of the river San Juan and the lake Nicaragua—

Annex 89

AUTHORIZATION TO NAVIGATE ISSUED BY THE EMBASSY OF NICARAGUA IN COSTA RICA.
SAN JOSÉ, 6 JULY 2006, NO. 1

Embassy of Nicaragua

AUTHORIZATION TO NAVIGATE
No. 01/2006

The Embassy of Nicaragua in Costa Rica, by authorization from the Ministry of Foreign Affairs of Nicaragua, grants this special authorization to navigate on the San Juan de Nicaragua River to the boat called "Furia L", owned by Jorge Lao Jarquín – J&L Transportes Acuáticos S.A., legal identity card 3-101-345313.

The boat must carry the Costa Rican and Nicaraguan flags.

The main characteristics of the boat are:

Name of boat	:	Furia L
Owner	:	Jorge Lao Jarquín
License	:	2116
Overboard	:	hp
Motor	:	Yamaha
Length	:	5-50
Prop	:	0.70
Beam	:	2.05
Power	:	100 HP

[H/written:]Illegible

Series : 308G31

Model : F100AEPL

Registration record : TOME 0009, ENTRY 407068SEC; 003, DATE 07 05 2001

Movement record : TOME: 0013, ENTRY 101692SEC002

Flag : COSTA RICAN AND NICARAGUAN.

Nicaraguan authorities have the right to cancel this permit in case of any breach of the Nicaraguan laws. Furthermore, the holders of this permit must subject to routine inspections by the respective authorities.

This authorization to navigate on the San Juan River is issued and shall be valid from 06 July to 06 October of two thousand and six.

Done at San José, Costa Rica, on the sixth of July of two thousand and six.

(Signed)

Leopoldo Ramírez

Ambassador

Karla E. Carcache H.

Deputy Chief of Mission w/consular functions

Annex 90

AUTHORIZATION TO NAVIGATE GRANTED EMBASSY OF NICARAGUA IN COSTA RICA ON BEHALF OF MINISTRY OF FOREIGN AFFAIRS OF NICARAGUA. SAN JOSÉ, 6 JULY 2006, NO. 2

Embassy of Nicaragua

AUTHORIZATION TO NAVIGATE
No. 02/2006

The Embassy of Nicaragua in Costa Rica, by authorization from the Ministry of Foreign Affairs of Nicaragua, grants this special authorization to navigate on the San Juan de Nicaragua River to the boat called "Steed", owned by Geovany Navarro, legal identity card C.I. 2-476-607, in accordance with letter dated 30 June 2006, receipt on 6 July 2006, asking "AUTHORIZATION FROM THE GOVERNMENT OF NICARAGUA TO NAVIGATE ON THE SAN JUAN RIVER IN ORDER TO ACCOMPLIANCE HUMANITARIAN MISSION WICH INCLUDE SOCIAL ASSISTANCE IN TAMBOR AND REMOLINITO'S SCHOOLS".

The boat must carry the Costa Rican and Nicaraguan flags.

The main characteristics of the boat are:

Name of boat : Steed

Owner : Geovany Navarro

License : L 1532

Motor : Suzuki

Length : 7.40 mts

Prop : 50 cms

Beam : 2.00 mts

Power : 21p

Series : 11501f253601

Model : 2003

Registration record : L 1532

Flag : COSTA RICAN AND NICARAGUAN.

Nicaraguan authorities have the right to cancel this permit in case of any breach of the Nicaraguan laws. Furthermore, the holders of this permit must subject to routine inspections by the respective authorities.

This authorization to navigate on the San Juan River is issued and shall be valid from 07 July of two thousand and six.

Done at San José, Costa Rica, on the sixth of July of two thousand and six.

(Signed)
Leopoldo Ramírez
Ambassador

Karla E. Carcache H.
Deputy Chief of Mission w/consular functions

Annex 91

AFFIDAVITS OF COLONEL RICARDO SÁNCHEZ.
7 DECEMBER 2006

PUBLIC DEED NUMBER SIX (6) CONTAINING A NOTARY STATEMENT. In Managua City, place of my domicile and residence, at two in the afternoon on December 7, 2006, BEFORE ME, MARTHA LORENA MURILLO ARGÜELLO, of legal age, married, a resident of Managua, Attorney and Notary Public of the Republic of Nicaragua, duly authorized by the HONORABLE SUPREME COURT OF JUSTICE to keep an original record of deeds during a five-year period that expires on May 9, 2011, there appears Nicaraguan Army Colonel RICARDO SÁNCHEZ MÉNDEZ, of legal age, married, a military, a resident of this City of Managua and the holder of ID card number zero, zero, one, two, four, zero, two, five, six, zero, zero, three, five, R (001-240256-0035R), who is personally known to me and has the necessary legal capacity to bind himself and enter into contracts, particularly for the purpose of executing this act, and states: ONE: That he wishes to refer to the claim filed by Costa Rica against Nicaragua before the International Court of Justice on September 29, 2005. TWO: That from December 2002 to this date, he has been the Chief of the Southern Military Detachment, a military jurisdiction that geographically belongs to the Department of Río San Juan, located to the southeast of the national territory. That in the zone under his charge, there are ten border posts, to wit: El Castillo, Boca de Bartola, Boca de San Carlos, Sarapiquí, Delta, San Juan de Nicaragua. Papaturro, Río Frío, Las Tablillas and Palo de Arco. There are plans to set up another one in Boca de Sábalos. Each post has seven officers, except for the post located at Sarapiquí", which is the headquarters of the Second Infantry Company in border zone number two, encompassing a geographic area of more than 100 kilometers from El Castillo to San Juan de Nicaragua. For navigation protection and security operations, it has two manned vessels. THREE: As regards Costa Rican civil navigation, the appearing party states that Costa Rican vessels carrying tourists usually enter the San Juan de Nicaragua River by Sarapiquí, originating from Puerto Viejo in Costa Rica territory and continue to the Tortuguero, also in Costa Rican territory. However, while navigating the San Juan de Nicaragua River, they must report at each post, where a spot check is made by reviewing the list of persons and verifying that they are not carrying any weapons, drugs, explosives, or any other flammable materials that could put the vessel at risk, while ensuring that the vessel meets all safety requirements for navigation. After this task is performed, the clearance certificate is issued. Nicaraguan migration authorities check the passport and consular visa of each person. For this task, the Migration Authority has staff in Boca de San Carlos, Sarapiquí, Delta y San Juan de Nicaragua. The vessels of Costa Ricans living along the costa Ricans banks of the San Juan de Nicaragua River are also checked and clearance certificates are issued free of charge. FOUR: The appearing party further states that he maintains good relations with the Costa Rican Civil Guard. In 2003, he initiated confidence-building activities with the eight and fourth public security forces. He exchanges information with Commissioner César Esquivel and another Commissioner by the name of Cubero regarding crimes that take place in the zone. He has scheduled meetings with them, which are alternatively held, sometimes in Nicaraguan territory and other times in Costa Rican territory. That he also supports the Civil Guard and Costa Rican population in humanitarian activities. He further emphasizes that since he has held this position, the Costa Rican Civil Guard has not navigated the San Juan de Nicaragua River, nor has he received any permission request to engage in this activity. He knows that the Costa Rican Civil Guard usually re-supplies its posts by land, for which purpose they have feeder roads, and he has even observed that a highway is being built in their territory, running parallel to the San Juan River. FIVE: During the time he has held this position, he has been able to verify that the vessels transporting articles of trade in the San Juan de Nicaragua River belong to Nicaraguan citizens who cross over to Costa Rican territory to buy basic consumption goods. The appearing party, having stated the foregoing, was advised by me of the value and legal transcendence of this Power of Attorney, the value of the general clauses that guarantee the validity of this instrument, and the special clauses contained in this instrument, as well as the scope of the implicit and explicit waivers made hereunder. And I, the Notary, read the entire document to the appearing party, who states its concurrence, approves and ratifies each and every clause, without making any amendment, and signs with the undersigned Notary. I attest to all related matters. /s/ Illegible RICARDO SÁNCHEZ MÉNDEZ /s/ Illegible MARTHA LORENA MURILLO ARGÜELLO (Attorney and Notary Public) COPIED BEFORE ME FROM THE FRONT OF FOLIO NUMBER SIX TO THE FRONT OF FOLIO NUMBER SEVEN OF MY REGISTER OF DEEDS NUMBER ONE KEPT DURING THIS YEAR AND, AT THE REQUEST OF MR. RICARDO SÁNCHEZ MÉNDEZ, I ISSUE THIS FIRST CERTIFIED TRUE COPY ON TWO STAMPED SHEETS, WHICH I SIGN, SEAL AND INITIAL IN MANAGUA CITY, AT TWO THIRTY IN THE AFTERNOON ON DECEMBER 7, 2006.

MARTHA LORENA MURILLO ARGÜELLO.
ATTORNEY AND NOTARY PUBLIC.

REPLY
OF COSTA RICA

RÉPLIQUE
DU COSTA RICA

DISPUTE CONCERNING NAVIGATIONAL AND RELATED RIGHTS

COSTA RICA v. NICARAGUA

REPLY OF COSTA RICA

VOLUME 1

15 January 2008

Chapter 1

Introduction

A. Introductory Comments

1.01 This Reply is filed in accordance with the Court's Order of 9 October 2007.

1.02 These proceedings concern breaches by Nicaragua of Costa Rica's perpetual right of free navigation and related rights in respect of the San Juan River. These rights are set out in a series of treaties and decisions commencing with the Treaty of Limits of 15 April 1858 ("the Treaty of Limits") and also result from customary international law.[1] Since the 1990s Nicaragua has imposed and maintained severe restrictions on the navigation of Costa Rican vessels and their passengers on the San Juan. Since Costa Rica commenced these proceedings, Nicaragua has tightened existing restrictions and imposed new restrictions which in combination tend to deny the substance of Costa Rica's rights entirely.

1.03 In contrast to Nicaragua's breaches, Costa Rica has scrupulously met its obligations in respect of the San Juan, and in particular has continued to fulfil its obligation to allow Nicaraguan boats to freely land on the Costa Rican bank of the River.[2] In addition, and contrary to Nicaragua's unsubstantiated assertions that Costa Rica has refused to engage in dialogue with Nicaragua on certain issues, Costa Rica has actively sought to settle this dispute in a manner consistent with respect for the rights clearly accorded to Costa Rica under the relevant instruments and decisions. These proceedings were brought as a last resort in order to have an authoritative and lasting settlement of Costa Rica's rights under the relevant instruments.[3]

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[1] CRM, Annexes, Vol. 2, Annex 7.

[2] This is acknowledged in evidence presented by Nicaragua itself: see NCM, Vol. II, Annex 91, Affidavit by Colonel Ricardo Sánchez, Point Five.

[3] CRM, Chapter 3, para. 3.49.

B. Nicaragua's Counter-Memorial

1.04 In its Counter-Memorial presented to the Court on 29 May 2007, Nicaragua asserts that "the issues raised by Costa Rica have already been settled by the 1858 Treaty and the 1888 Cleveland Award".[4] It is true that Costas Rica's *rights* over the San Juan are settled by the 1858 Treaty, the Cleveland Award and the other decisions, agreements and rules which Costa Rica has invoked in its Memorial. But unfortunately those rights are not being respected by Nicaragua – either because it denies their existence (as with the right of free navigation for purposes of commerce) or it denies the facts – of which, nonetheless, there is ample evidence. The issues raised by Costa Rica arise through this strategy of denial by Nicaragua, of which its Counter-Memorial is only the most recent instance.

1.05 Nicaragua's Counter-Memorial contains a range of contradictions, misrepresentations and mistranslations of documents.

1.06 For example, Nicaragua argues that the phrase "*con objetos de comercio*" in Article VI of the 1858 Treaty ought to be interpreted as "with articles of trade."[5] However it later implies that "*con objetos de comercio*" means "for purposes of commerce": it states that "the right of free navigation [in Article VI of the 1858 Treaty] is articulated in the form of a careful statement of purposes"[6] and cites with approval President Cleveland's Award which stipulates that Costa Rica has a right of "free navigation … *for the purposes of commerce*."[7]

1.07 Other contradictions emerge from consideration of the arguments presented in the Counter-Memorial as a whole. For example, on the applicable law Nicaragua states that Costa Rica's arguments "stand or fall with the interpretation of [the 1858 Treaty] and the subsequent Cleveland Award"[8] and that the 1858 Treaty and the 1888 Cleveland Award "make up the Applicable Legal Regime on the San Juan."[9] It criticises Costa Rica for seeking to rely on legal principles which go beyond or are independent of those bilateral instruments.[10] However, Nicaragua also claims that principles of general international law apply "so far as they do not contradict the relevant provisions contained in the 1858 Treaty as interpreted by the 1888 Cleveland Award."[11] Nicaragua relies on many other treaties for different purposes, including as an aid to interpret the 1858 Treaty.[12] It argues that treaties signed between 1858 and 1888 clarify the meaning of "*objetos de comercio*" as "articles of trade" and not "purposes of commerce."[13] In some instances Nicaragua relies on the text of unratified treaties without drawing the Court's attention to the fact that those treaties are unratified: for example, it states that the Alvarez-Zambrana Treaty of 5 February 1883 "establishes the obligation 'to fly, in addition to one's own, the national flag of the State that exercises sovereignty'" without noting that it was not ratified.[14]

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[4] NCM, Introduction, para. 4.

[5] See, for example, NCM, para. 1.3.24; NCM, Introduction, para. 20.

[6] See NCM, para. 2.1.51.

[7] See NCM, para. 2.1.62.

[8] NCM, Introduction, para. 19.

[9] NCM, para. 1.3.46.

1.08 In some instances Nicaragua misrepresents the content of documents produced in the Annexes to Costa Rica's Memorial. For example, when it cites the Carazo-Soto Treaty of 26 July 1887, NCM quotes from Article 6.3 as follows "[t]he right granted to Costa Rica to navigate with articles of trade on the San Juan River…" It references CRM Annex 15.[15] The English translation there produced by Costa Rica states "[t]he right, granted to Costa Rica, of navigation for purposes of commerce [*objetos de comercio*] in the San Juan River…"[16]

1.09 Nicaragua misrepresents the language used by President Cleveland in the 1888 Award. It states:

> "For President Cleveland, the only navigation by Costa Rican vessels of the revenue service that was permitted by the treaty was that which is 'related to and connected with' the right to navigate with articles of trade."[17]

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[10] NCM, Reservations, p. 251.

[11] NCM, para. 3.3.10.

[12] For example, it relies on the unratified 1857 Juárez-Cañas Treaty to establish the purpose of the 1858 Treaty (NCM, paras. 1.2.39-1.2.40) and on various agreements as *travaux préparatoires* to the 1858 Treaty (NCM, paras. 1.3.1-1.3.3).

[13] NCM, para. 1.3.32-1.3.35.

[14] NCM, para. 1.3.33 (NCM Annex 9). On the relevance of general international law to this dispute, see Chapter 2 of this Reply.

[15] NCM, para. 3.1.43.

[16] See CRM, Annexes, Vol 2, Annex 15.

[17] NCM, para. 3.1.54.

The original English version of the relevant part of Cleveland's Award clearly provides for a right of navigation for vessels of the revenue service "as may be related to and connected with [Costa Rica's] enjoyment of the 'purposes of commerce'..."[18] No doubt Nicaragua wants President Cleveland to have used the term "articles of trade" but that is not what President Cleveland wrote.[19]

1.10 Nicaragua's Counter-Memorial also contains inaccurate statements about the meaning of the term "*objetos*" in Spanish. For example, Nicaragua states that it is "entirely beyond the normal and usual use of the Spanish language to speak of the [plural] *objetos* ... when referring to its purposes, aims or objectives."[20] In fact several contemporary treaties, including treaties to which Nicaragua was a signatory, use the plural "*objetos*" when referring to purposes. Two examples include the US-Nicaragua Treaty of Friendship, Commerce and Navigation (Lamar-Zeledón) of 16 March 1859 and the US-Nicaragua Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson) of 21 June 1867. Article II of the Lamar-Zeledón Treaty uses the phrase "*para los objetos de su comercio*," the English version of which states "for the purposes of their commerce."[21] Similarly, Article II of the Ayon-Dickinson Treaty uses the phrase in Spanish "*para objetos de su comercio*" which is reflected in the English "for the purpose of their commerce."[22] The use of the plural "*objetos*" to mean purposes pre-dates the 1858 Treaty. For example, Article II of the Costa Rica-US Treaty of Friendship, Commerce and Navigation (Molina-Webster) of 10 July 1851 uses the phrase "*para los objetos de su comercio*" to mean "for the purposes of their commerce."[23]

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[18] See CRM, Annexes, Vol 2, Annex 16. A similar misquotation is made of the Carazo-Soto Treaty (CRM, Annexes, Vol 2, Annex 15) in NCM, para. 3.1.43.

[19] As to the meaning of "*con objetos de comercio*", see below, paragraphs 3.39-3.78.

[20] NCM, para. 4.1.27.

[21] United States-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lamar-Zeledón), Managua, 16 March 1859. The Spanish version is from US National Archives, Washington DC, Unperfected Treaty Series X-2; the English version is from CL Wiktor, *Unperfected Treaties of the USA*, Volume II, 1856-1882, pp. 157-166: CRR Annexes, Vol 2, Annex 13.

[22] United States-Nicaragua, Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson), Managua, 21 June 1867. Both the English and Spanish official versions are reproduced in GP Sander, *The Statutes at Large, Treaties and Proclamations of the United States of America from December 1867 to March 1869, Volume XV*, pp. 549-562: CRR Annexes, Vol 2, Annex 17.

[23] Costa Rica-United States, Treaty of Friendship, Commerce and Navigation (Molina-Webster), Washington, 10 July 1851. The Spanish version is from *Colección de los Tratados Internacionales Celebrados por la Republica de Costa Rica*, Vol. I, pp. 65-72; and the English version is reproduced in *Report of the Isthmian Canal Commission 1899-1901*, pp. 417-410: CRR, Annexes, Vol 2, Annex 9.

1.11 Nicaragua's Counter-Memorial contains inaccurate translations of key documents. For example, Nicaragua presents an English translation of Article II of the US-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri) of 16 November 1857, which provides in part for reciprocal rights "to hire and occupy houses and warehouses for commerce".[24] The Spanish version produced by Nicaragua, for which no source is listed but which appears to be from a *Gaceta* from El Salvador, reads "*asi como alquilar y ocupar casas y almacenes para objeto de su comercio*."[25] The original Spanish text reads "*asi como alquilar y ocupar casas y almacenes para objetos de comercio*"[26] and the original English text refers to reciprocal rights "also, to hire and occupy houses and warehouses for the purpose of their commerce."[27] Nicaragua's omission of the full phrase "for the purpose of their commerce" in its English translation renders its translation inaccurate and misleading. This example shows again that the plural "*objetos*" can be used to mean "purpose" in English.

1.12 Nicaragua presents an inaccurate translation of Article XX of the Cass-Irisarri Treaty which misrepresents the way in which both Nicaragua and the United States understood the scope of Costa Rica's navigational rights on the River. Nicaragua's translation of Article XX reads as follows:

> "Article XX. It is understood that nothing in this treaty shall adversely affect the *desires* of the Government of the Republic of Costa Rica and its people to free navigation in the San Juan River of its persons and goods to the Atlantic Ocean and vice versa."[28] (Emphasis added.)

The authentic English text of Article XX provides:

> "Article XX: It is understood that nothing contained in this treaty shall be construed to affect the *claim* of the government and citizens of the Republic of Costa Rica to a free passage by the San Juan River for their persons and property to and from the ocean."[29] (Emphasis added.)

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[24] See NCM, Vol II, Annex 5.

[25] See NCM, Original Documents Deposited Within the Registry, Part I, Annex 5.

[26] United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), 16 November 1857. The original Spanish is reproduced from US National Archives, Washington DC, Unperfected Treaty Series W-2: CRR, Annexes, Vol 2, Annex 10.

[27] The English version is reproduced in CL Wiktor, *Unperfected Treaties of the USA*, Volume II, 1856-1882, pp. 135-143: CRR, Annexes, Vol 2, Annex 10.

[28] NCM, Vol II, Annex 5.

[29] CRR, Vol 2, Annexes, Annex 10.

The authentic English text, using the term "claim", is consistent with the original Spanish which refers to "*pretensión.*" By substituting the English "desires" for "claim" Nicaragua evidently seeks to provide a weaker representation of Costa Rica's navigational rights. It is also clear from the authentic English version that it was understood by both Nicaragua and the United States that Costa Rica's navigational rights included navigation by the Costa Rican Government (with public vessels) and by its citizens and was inclusive of the right to transport persons as well as property.

1.13 Nicaragua presents an inaccurate translation of a 2001 Judgment of the Costa Rican Constitutional Chamber in order to give the impression that Costa Rica's own court denied that Costa Rica holds a right to navigate on the San Juan for the purpose of re-supplying border posts. It represents the Court as having stated that "Costa Rica holds the perpetual right to use its lower *banks* for commercial, revenue and security purposes,"[30] but a correct translation of the Spanish used in the judgment is: "Costa Rica holds the perpetual right to use its lower *course* for commercial, revenue and security purposes."[31] The Costa Rican Constitutional Chamber did not deny that Costa Rica holds a right to navigation on the River.

1.14 Nicaragua accuses Costa Rica of producing inaccurate translations of certain documents.[32] This allegation is not specified and it is not supported. Costa Rica expressly denies that it has misrepresented documents to the Court and it stands by the accuracy of the translations of documents it has presented.

1.15 Nicaragua's misrepresentations go beyond the mistranslation of important documents and even include the misrepresentation of historical events, the facts of which were explained in Costa Rica's Memorial. For example, Costa Rica described the occasion on which the Costa Rican steamer *Adela*, on a journey to install the Guards at the fiscal post at Terrón Colorado, Los Chiles, stopped before it entered that part of the San Juan in which Costa Rica has no treaty right of navigation. It had navigated on the San Juan from the mouth of the San Carlos River to three miles below Castillo Viejo before it stopped and left its arms and ammunition on the Costa Rican bank. The Commander then travelled

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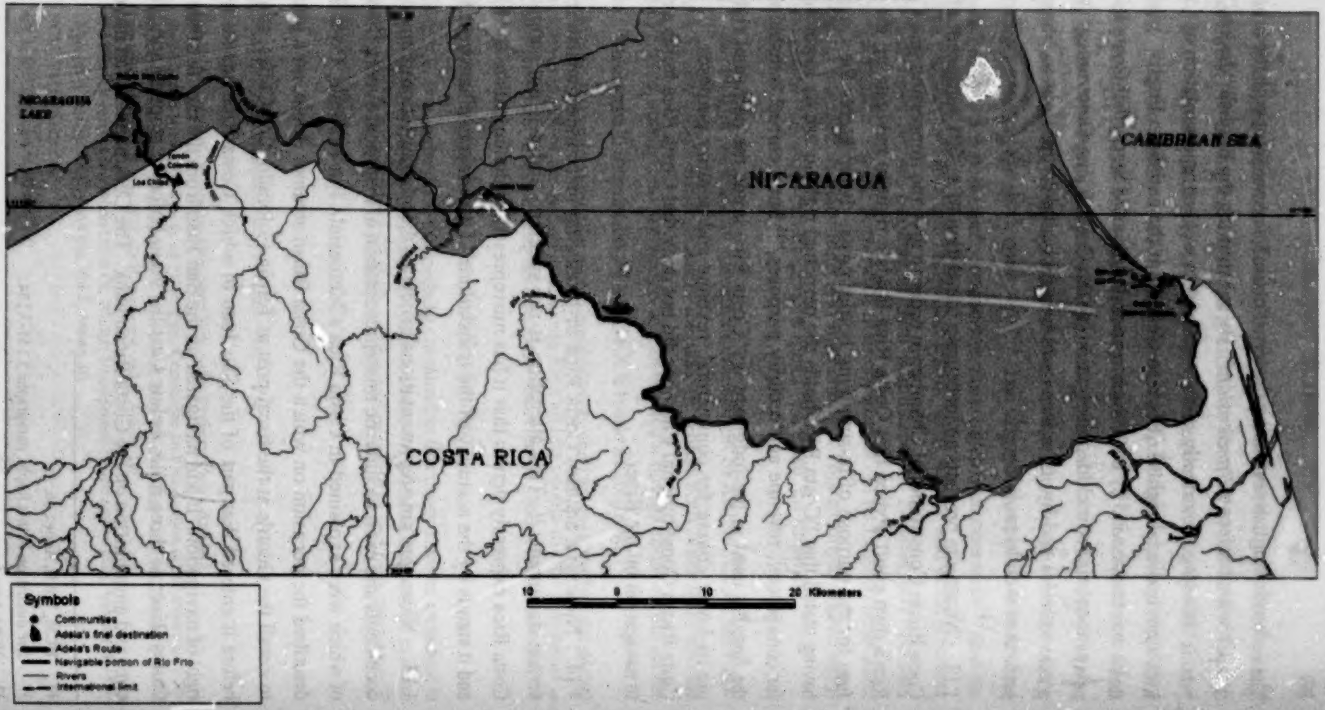
[30] NCM, Vol II, Annex 66.

[31] See discussion in this Reply, paragraphs 3.151-3.154.

[32] NCM, Introduction, para. 20.

Sketch map 1

NAVIGATION OF THE "ADELA" STEAMER, MARCH 1892


NICARAGUA LAKE
Los Chiles
NICARAGUA
COSTA RICA
CARIBBEAN SEA
10
0
10
20 Kilometers
Symbols
Communities
Adela's final destination
Adela's Route
Navigable portion of Rio Frio
Rivers
International limit

to the Nicaraguan post at Castillo Viejo to request permission to continue navigating with arms in that part of the San Juan in which Costa Rica had no treaty right of navigation, on its way to Los Chiles, which is on the Costa Rican side of the border near the source of the San Juan in the Lake of Nicaragua. That permission having been denied, the Costa Rican Commander was obliged to transport the arms and ammunition by land.[33] Nicaragua argues this incident shows that Costa Rica did not have a right to navigate on the San Juan with arms.[34] The materials cited by Costa Rica clearly indicate that the *Adela* had *already* navigated with arms on the River to the point three miles below Castillo Viejo without any need to obtain permission from Nicaragua. Permission was sought to navigate in the upper San Juan, outside of that part of the watercourse in which Costa Rica has a treaty right of navigation. Sketch Map 1 opposite clearly marks the journey of the *Adela* and demonstrates that Nicaragua has misrepresented this incident.

1.16 Nicaragua purports to make two "reservations." First, if the Court determines Costa Rica's claims on legal principles beyond those found in the relevant bilateral agreements, Nicaragua reserves its right to claim that the Colorado River is an international waterway subject to the provisions of general international law for international watercourses not subject to a special treaty regime.[35] Second, Nicaragua "makes express reservation of her rights to bring claims against Costa Rica" for ecological damage done to the waters of the San Juan and the diversion of its traditional water flow into "agricultural, industrial and other uses in Costa Rican territory and into the water flow of the Colorado River".[36]

1.17 These "reservations" are of course not counter-claims. Nicaragua's right to bring a counter-claim expired with the filing of NCM.[37] Nor do these "reservations" relate to or arise from any relief sought by Costa Rica. The

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[33] CRM, paras. 4.85-4.87.

[34] NCM, paras. 4.2.19-4.2.21.

[35] See NCM, Reservations, p. 251, para. 2.

[36] See NCM, Reservations, p. 251, para. 3.

[37] See Rules, Article 80(2). Quite apart from the requirement of timeliness, Article 80 requires a counter-claim to be "directly connected with the subject-matter of the claim of the other party": see Article 80(1). Nicaragua's "reservations", even if they had been timely presented as counter-claims, would not have satisfied this requirement.

"reservations," apart from being devoid of merit, are without incidence for the present case.

C. Key Issues

1.18 On the one hand, a few points of agreement between the parties can be identified. For example, the parties agree that Costa Rica's navigational rights are defined by the 1858 Treaty of Limits and the 1888 Cleveland Award.[38]

1.19 On the other hand, clear points of disagreement emerge from the Counter-Memorial. For example, Nicaragua argues that its sovereignty over waters of the River is a reason for a narrow interpretation of Costa Rica's navigational and related rights.[39] On the contrary, the 1858 Treaty conditions Nicaragua's dominion and sovereign jurisdiction over the waters of the River upon Costa Rica's perpetual rights of free navigation.[40] The grant of sovereignty to Nicaragua in Article VI of the Treaty of Limits is immediately qualified by Costa Rica's perpetual right of free navigation.[41]

1.20 The parties also disagree as to the relevance of other instruments and documents, including the 1916 Judgment of the Central American Court of Justice, as well as to the relevance of general international law. Nicaragua argues that the 1916 Judgment is "of limited relevance in the present case" and that it did not "further specify the rights recognized by the relevant instruments."[42] In Costa Rica's view, its rights of use of the River "were further specified (with the force of *res judicata*)" by the Central American Court of Justice in its 1916 Judgment.[43] The Central American Court necessarily had to pronounce on Costa Rica's rights of navigation on the San Juan since these were affected by the Bryan-Chamorro Convention. The Court there found that Costa Rica possess "for purposes of commerce, permanent rights of free navigation … and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation is common."[44] Costa Rica's position on the relevance of the 1916 Judgment is clearly stated in its Memorial and is addressed further in Chapter 2 of this Reply.[45]

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[38] See NCM, Introduction, paras. 18-19. See also CRM, para. 4.01.

[39] NCM, paras. 2.1.9, 2.1.48-2.1.50, 2.1.52.

[40] CRM, para. 4.06.

[41] See CRM, para. 4.06.

[42] NCM, para. 3.2.6.

[43] CRM, para. 1.04. See also CRM, paras. 2.42-2.49.

1.21 A significant point of disagreement results from Nicaragua's attempt to relitigate in these proceedings issues which have been decided by Cleveland's Award of 1888. In particular, Nicaragua seeks to limit President Cleveland's decision to the extent that it affirms Costa Rica's right to navigate with vessels of the revenue service.[46] Consistently with the terms of Cleveland's Award, Costa Rica's position is that it has a right of navigation for vessels of the revenue service: (1) when related to and connected with the enjoyment of the "purposes of commerce" and (2) as necessary for the protection of its enjoyment of that right of navigation.[47]

1.22 Various points of disagreement about the historical background have also emerged: these points are addressed in detail in the Appendix to this Reply. Nicaragua claims that the mouths of the San Juan River belonged to the province of Nicaragua from 1573 to 1821.[48] However, as is demonstrated in this Reply, the 1573 Charter relied upon by Nicaragua is internally inconsistent and in any event does not support the contention that the River belonged to Nicaragua exclusively. Instead the evidence supports Costa Rica's position that the San Juan River did not exclusively belong to any of the provinces during the colonial period.[49] In addition, Nicaragua's suggestion that Costa Rica annexed "Partido de Nicoya" unilaterally is without basis: by plebiscite on 25 July 1824, the people of Nicoya decided to join Costa Rica, a decision later acknowledged by the Federal Congress of Central America,[50] and affirmed by the people of Nicoya no less than seven times between 1826 and 1854.

1.23 Nicaragua also argues that Costa Rica disregarded the principle of *uti possidetis iuris*, particularly on account of the incorporation of Nicoya into its territory.[51] This is a misrepresentation. Nicoya was an administrative unit whose inhabitants decided through a plebiscite their incorporation into Costa Rica after the independence of Central America. This was nothing exceptional in Hispanic America. Several subordinate administrative dependencies decided to leave the administrative divisions they belonged to, these moves resulting in the dismemberment of some of the latter. There were, both in Central and South America, situations of merger of a former colonial subdivision with a State having constituted a different colonial unit in the past, as well as situations of creation of a new State from subdivisions within a Vice-Royalty or a Captaincy-General, leading to the latter's fragmentation. Chiapas, Ecuador, Paraguay and Uruguay are some examples. What is essential when applying the principle of *uti possidetis* is the respect of the territorial limits existing at the time of independence: it was out of the question to alter the territorial limits of Nicoya when incorporating it into Costa Rica. Equally, the principle of *uti possidetis iuris* does not mean that the situation existing at the time of independence must be considered as immutable. Territorial changes are always possible, provided that they occur in conformity with international law. As mentioned above, the incorporation of Nicoya into Costa Rica was recognised by the Congress of the newly independent Federal Republic of Central America, which included both Costa Rica and Nicaragua, and it was affirmed by the people of Nicoya on seven separate occasions.[52] For all these reasons, Nicaragua's allegation of an illegal annexation of Nicoya by Costa Rica is groundless. The same can be said of Nicaragua's assertion that the Constitutions of Costa Rica of 1825 and 1841 are contradictory, the former recognising the boundaries in accordance with the principle of *uti possidetis iuris* and the latter disregarding it.[53] The reference to the borders set in the 1825 and 1841 Constitutions are consistent, as is demonstrated in the Appendix to this Reply.[54]

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[44] CRM, Annexes, Vol 2, Annex 2.

[45] CRM, para. 1.04. See also CRM, paras. 2.42-49; this Reply, paragraphs 2.08-2.18, esp. paragraph 2.10.

[46] See NCM, paras. 3.1.1-3.1.10 and 3.1.19-3.1.24.

[47] See CRM, paras. 4.78-4.79; see below, paragraphs 3.79-3.95.

[48] NCM, paras. 1.2.2-1.2.3, 1.2.11. See also NCM, para. 1.2.38.

[49] See below, Appendix, paragraphs A.02-A.14.

[50] See below, Appendix, paragraphs A.15-A.22.

1.24 Nicaragua contends that there is no historical or documentary support for Costa Rica's claim that it participated solely or jointly with Nicaragua in canalization or transit contracts in respect of the San Juan.[55] But Costa Rica was involved in various canal contracts and treaties, an assertion supported by documents presented by Costa Rica and even by documents presented by Nicaragua itself.[56] For example, Costa Rica was party to the Costa Rica-Nicaragua-F Belly Convention relative to the Concession of an Inter-Oceanic Canal on 1 May 1858.[57] Costa Rica's participation in various canal contracts and treaties is discussed in the Appendix to this Reply.[58]

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[51] NCM, para. 1.2.4.

[52] See below, Appendix, paragraphs A.15-A.22.

[53] NCM, paras. 1.2.19-1.2.23.

[54] See below, Appendix, paragraphs A.23-A.28. See also CRM, paras. 2.12-2.14.

[55] NCM, para. 1.2.38.

1.25 A further point of disagreement can be identified in relation to Costa Rica's right to navigate with revenue service vessels as affirmed in the Cleveland Award. Nicaragua argues that there is no right of free navigation for Costa Rican public vessels and that Costa Rica's right to navigate with vessels of the revenue service is "only to the extent necessary to the exercise of [the right] to navigate with articles of trade (*con objetos de comercio*)."[59] It claims that the practice of the United States in the 19th century with regard to the "revenue cutters" is of "no present relevance."[60] On the contrary, Costa Rica's position, in accordance with the terms of the Cleveland Award, is that it has a right of navigation for public vessels. The Cleveland Award provided that Costa Rica has a right of navigation for "such vessels of the Revenue Service as may be related to and connected with [Costa Rica's] enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[61] Costa Rica's right to navigate with vessels of the revenue service is addressed in more detail in Chapter 3 of this Reply.[62] In particular the practice relating to revenue cutters is relevant. Contemporary practice regarding revenue cutters in the mid-to-late 19th century would have been very familiar to President Cleveland and his advisors, and illuminates what they must be taken to have intended in drawing a distinction between men-of-war and revenue cutters.[63]

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[56] See below, Appendix, paragraphs A.23-A.28

[57] See CRM, Annexes, Vol 2, Annex 8.

[58] See below, Appendix, paragraphs A.29-A.32.

[59] NCM, Subsection 3, p. 110. See also NCM, paras. 3.1.27-3.1.31 and paras. 4.2.4-4.2.6.

[60] NCM, para. 4.2.12.

[61] Cleveland Award, Second Point: CRM, Annexes, Vol 2, Annex 16, cited in CRM, para. 4.83. See generally CRM, paras. 4.73-4.96.

[62] This Reply, paragraphs 3.79-3.95.

[63] CRM, paras. 4.81-82. Nicaragua in fact uses the same practice in the same way: see NCM, para. 4.2.12.

1.26 Nicaragua contends that there is no support for a Costa Rican right to safeguard and defend the lower San Juan. It argues that any Costa Rican obligation to safeguard the San Juan would only arise in the event of external aggression, would have to be carried out together with Nicaragua and would have to be performed from the Costa Rican bank of the River, not from boats on the water.[64] Costa Rica's position, in accordance with the text of Article IV of the 1858 Treaty, is that Costa Rica has three sets of rights and obligations: (1) defence of the common bay; (2) safeguarding of the San Juan; and (3) defence of the River in case of aggression. As the language of Article IV demonstrates, only the third of these rights and obligations is conditioned on aggression. These rights and obligations are permanent.[65] Costa Rica's public rights of protection and defence are addressed in more detail in Chapter 3 of this Reply.[66]

D. The Issues for the Court

1.27 The issue before the Court is the scope of Costa Rica's perpetual right of free navigation and related rights in respect of the San Juan River and violation of those rights by Nicaragua. As was emphasised in its Memorial, Costa Rica is seeking the cessation of all Nicaraguan conduct which prevents the free and full exercise and enjoyment of the rights that Costa Rica possesses on the San Juan, or which prevents Costa Rica from fulfilling its responsibilities to safeguard and protect the River under Article IV of the Treaty of Limits, Article 2 of the 1956 Agreement and otherwise.[67]

1.28 This Reply consists of five further Chapters as follows:

Chapter 2 sets out the general international rules relevant to this dispute, in particular those relating to international waterways and concerning the interpretation of treaties.

Chapter 3 addresses the scope of Costa Rica's substantive rights, rebutting Nicaragua's interpretation of them. Two tables appended to Chapter 3 demonstrates that Costa Rica's interpretation is correct. **Table 1** shows the use of the term "*objetos*" as meaning "purposes" in 19th century documents and **Table 2** sets out the terms used to refer to "articles of trade", "goods", "things" and similar concepts in 19th century documents.

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[64] NCM, para. 4.2.35.

[65] CRM, para. 4.99.

[66] This Reply, paragraphs 3.79-3.95.

[67] See CRM, para. 1.08.

Chapter 4 responds to Nicaragua's claims that it has not breached Costa Rica's navigational and related rights and demonstrates that Nicaragua's breaches of those rights are continuing.

Chapter 5 responds to NCM's arguments in respect of remedies, demonstrating first that Costa Rica is entitled to the remedies it has claimed and second that Nicaragua's request for a declaration as to the scope of Costa Rica's rights is unfounded, as is Nicaragua's request for a declaration that it is entitled to dredge the San Juan.

1.29 An **Appendix** to this Reply addresses relevant historical issues disputed by Nicaragua.

1.30 Annexed to this Reply is one volume of documentary annexes (Annexes 1-72). A list of annexes is provided at the end of this volume.[68]

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[68] For reasons of space, the English translations of certain documents only are included in the Annexes; the Spanish versions are included in Complete Copies of Certain Annexes submitted to the Court.

Chapter 2

General International Law Relevant to the Dispute

A. Introduction

2.01 In order to place the particular rules related to Costa Rica navigational and related rights in the context of general international law, the present Chapter will deal with the general international rules related to international waterways and those concerning the interpretation of treaties. It consists of two substantive sections. **Section B** explains why, contrary to the position of Nicaragua in its Counter-Memorial, the San Juan is a boundary and international river. **Section C** addresses the applicable principles of interpretation. In particular, this Section demonstrates that Nicaragua's focus on its sovereignty over the waters of the River and its underestimation of Costa Rica's rights of navigation, protection and defence of the River are without foundation. Conclusions on the general international law relevant to this dispute are drawn in **Section D**.

B. The San Juan as an International River

(1) Nicaragua's Position

2.02 In its Counter-Memorial, Nicaragua asserts that "[t]he San Juan is of course not an international River since it flows entirely within one country and besides is subject to a special Treaty Regime."[69] Under that regime, the respondent State has "granted" certain rights to Costa Rica in matters of navigation and of defence. These rights are limited, however, as sovereignty over the waters of the River lies with Nicaragua. The latter retains the exclusive right to carry passengers on the River and Costa Rica must exercise its navigation rights "by reference to the legitimate interests of [Nicaragua]";[70] as to the defence of the watercourse, Costa Rica's rights (and obligations) are confined to its bank of the River.

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[69] NCM, para. 4.1.29.

[70] NCM, para. 2.1.50.

2.03 The instrument effecting the "grant" referred to in the preceding paragraph is the Cañas-Jérez Treaty of 15 April 1858. For Nicaragua, that Treaty is a territorial settlement; it does not establish a watercourse regime. This is why general international law cannot be relied on (although even Nicaragua actually does so[71]).

2.04 Nicaragua asserts that Costa Rica, by its actions, claims and arguments, seeks to turn a simple territorial settlement into an international regime amounting to shared jurisdiction over the watercourse.[72]

2.05 Nicaragua admits that the subject-matter of the dispute is governed by the Cañas-Jérez Treaty of 1858 and the 1888 Cleveland Award.[73] But for Nicaragua the relevance of the Cleveland Award is diminished as "with respect to navigation with articles of trade Costa Rica can have no greater rights under the Award than she has under the Treaty itself."[74] Nicaragua contends that the 1916 Judgment of the Central American Court of Justice[75] and the 1956 Agreement[76] are of minimal relevance. It also seeks to undermine the relevance of the Cuadra-Lizano Joint Communiqué of 30 July 1998[77] by emphasising that Nicaragua unilaterally declared it null and void[78] – a declaration Costa Rica rejected.

2.06 Nicaragua then attempts to give the relevant instruments a meaning which restricts the scope of Costa Rica's rights in navigation and defence matters, in accordance with Nicaragua's own arguments about the limited character of Costa Rica's rights and the unlimited character of its rights of sovereignty.

2.07 In this Chapter Costa Rica analyses these assertions, examining the following points in turn: applicable law; the San Juan as a boundary river, and the San Juan as a river endowed with an international regime. Specific issues of interpretation are dealt with in Chapter 3.

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[71] NCM, paras. 2.1.54-2.1.57; 2.1.59-2.1.61 and 2.1.63-2.1.64.

[72] NCM, para. 3.1.28.

[73] CRM, Annexes, Vol 2, Annex 16.

[74] NCM, para. 4.2.1.

[75] CRM, Annexes, Vol 2, Annex 21.

[76] CRM, Annexes, Vol 2, Annex 24.

[77] CRM, Annexes, Vol 2, Annex 28.

[78] NCM, paras. 3.2.4-3.2.14.

(2) The Applicable Law

2.08 The parties agree that the case is primarily governed by the 1858 Treaty and the 1888 Cleveland Award, that Award confirming Costa Rica's right to sail vessels in the lower part of the San Juan "for purposes of commerce" and its right to sail public vessels in connexion with such navigation. However, Nicaragua's acceptance of the Cleveland Award appears to be conditioned on that Award's conformity with Nicaragua's own interpretation of the 1858 Treaty.[79]

2.09 This view cannot be accepted. The 1888 Award interprets the relevant provisions of the 1858 Treaty. It has the force of *res judicata*. It authoritatively determines the meaning of Articles IV and VI of the Cañas-Jérez Treaty. By its agreement, given in advance, to accept the Award, Nicaragua accepted President Cleveland's interpretation of the Treaty: its attempt now to undermine it by reference to an unduly restrictive interpretation of the 1858 Treaty must be rejected.

2.10 Nicaragua also argues that the 1916 Judgment of the Central American Court of Justice is without incidence for the present dispute. It views the Judgment as a ruling limited to the issue of whether the Bryan-Chamorro Convention for the construction of an inter-oceanic canal, concluded between the United States and Nicaragua on 5 August 1914 without consulting Costa Rica,[80] was in contravention of Article VIII of the Cañas-Jérez Treaty. According to Nicaragua it merely restated what was said by the 1858 Treaty as interpreted by the Cleveland Award.[81] That is not correct, as is shown by the passages of the 1916 Judgment cited in Costa Rica's Memorial.[82] To the Central American Court, the "ownership" exercised by Nicaragua over the San Juan "is neither absolute or unlimited": Costa Rica is established "in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory". Further, "the limitation of the presence of Costa Rica's ships devoted to revenue and defensive purposes" in no way detracts from Costa Rica's

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[79] NCM, para. 4.2.1.

[80] CRM, Annexes, Vol 2, Annex 20.

[81] NCM, para. 3.2.6.

[82] CRM, paras. 2.46-2.48.

"practical" ownership; Costa Rica possesses "the contractual right of perpetual navigation … accompanied by the full privilege of transit and commerce," whereas "Nicaragua is impressed with the duty not to interfere with navigation, but, on the contrary, to keep the course of the river open."[83] How can one assert that these findings are irrelevant, especially given the stark contrast between the actual situation today and that which ought to prevail as determined by the Central American Court?

2.11 The Fournier-Sevilla Agreement concluded on 9 January 1956[84] pursuant to Article IV of the 1949 Pact of Amity[85] is dismissed by Nicaragua as a mere repetition of the terms of the 1858 Treaty and the 1888 Award.[86] Again this is not correct. In Article 1 of the 1956 Agreement the parties undertake to facilitate and expedite transit through the River; in Article 2, they agree to cooperate to safeguard their common border. This could only be done, on the part of Costa Rica, by allowing its police to navigate on the River with normal arms and on the basis of an ability to re-supply Costa Rica's border posts. Perhaps Nicaragua does not wish to be reminded of this Agreement and the events preceding its conclusion?[87]

2.12 Another relevant text is the Cuadra-Castro Joint Communiqué of 8 September 1995 which refers to far-reaching cooperation for the joint or parallel surveillance of the common border.[88] That such cooperation would not be possible without the assistance of Costa Rican public vessels is evident; that such patrolling effectively took place is demonstrated by the evidence produced by Costa Rica.[89]

2.13 Finally there is the Cuadra-Lizano Joint Communiqué of 30 July 1998,[90] which confirms the right of Costa Rican police officers to navigate on the San

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[83] CRM, Annexes, Vol 2, Annex 21, at pp. 219, 220 and 222.

[84] CRM, Annexes, Vol 2, Annex 24.

[85] CRM, Annexes, Vol 2, Annex 23.

[86] NCM, para. 3.2.5.

[87] CRM, para. 2.52.

[88] CRM, Annexes, Vol 2, Annex 27.

[89] CRM, para. 4.105 & note 246. See also this Reply, Appendix, paragraphs A.33-A.44.

[90] CRM, Annexes, Vol 2, Annex 28.

Juan, without, as Nicaraguan Minister Cuadra said,[91] detracting from Nicaragua's sovereignty. Nicaragua objects that this agreement was made by authorities not vested with treaty-making power and that it could be "harmful to the national sovereignty of [Nicaragua] clearly established in the Jérez-Cañas Treaty, the Cleveland Award and consecrated in [Nicaragua's] Political Constitution."[92] For these reasons, Nicaragua unilaterally declared the instrument null and void, an act rejected by Costa Rica.[93]

2.14 There are, in conclusion, a series of texts relevant to the issue at hand: the 1858 Treaty, the 1888 Award, the 1916 Judgment and various instruments such as the Sevilla-Fournier Agreement (1956), the Cuadra-Castro (1995) and Cuadra-Lizano (1998) Joint Communiqués. All these texts are connected with the San Juan as a boundary river.

2.15 In addition, customary international law is also relevant to adjudication of the present dispute and to the interpretation of the relevant treaty provisions. Regarding navigation – and contrary to what applies to Costa Rica's related rights, as will be explained[94] – any recourse to customary law is contingent on the *lex specialis* resulting from the 1858 Treaty, as interpreted by the 1888 Cleveland Award and the 1916 Judgment of the Central American Court of Justice.

2.16 The reference made in the Nicaraguan Counter-Memorial to the *Faber* case and to a doctrinal comment[95] therefore is of little relevance. Two observations may nevertheless be made. The first is that *Faber* pertains to navigation under the flag of a non-riparian State. The second relates to a comment made by a writer on that case, invoked by Nicaragua. In its original text, that passage reads:

> "La sentence arbitrale en l'affaire *Faber* met en relief l'opposition entre la doctrine de la libre navigation, création de l'Europe du XIXe siècle, et la conception latino-américaine, qui fait dépendre la navigation de la volonté de l'Etat riverain ou des Etats riverains. Cette conception *semble du reste l'emporter sur la thèse subsidiaire qui fut*

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[91] CRM, para. 4.116; CRM, Annexes, Vol 2, Annex 28.

[92] NCM, para. 3.2.12.

[93] CRM, para. 3.31. Cf. also CRM, Annexes, Vol. 3, Annex 50.

[94] See below, paragraphs 3.109-3.121.

[95] NCM, para. 4.1.14.

développée par le surabitre Duffield et qui consistait à limiter la libre navigation aux trajets sans transbordement vers la mer ou en provenance de celle-ci.
La doctrine, quant à elle, semble à peu près unanime: en Amérique latine, il n'existe pas de liberté de navigation en l'absence de concession unilatérale ou de disposition conventionnelle..."[96] (Words omitted by Nicaragua in italics.)

2.17 In NCM, that passage runs as follows:

"La sentence arbitrale en l'affaire *Faber* met en relief l'opposition entre la doctrine de la libre navigation, création de l'Europe du XIXe siècle, et la conception latino-américaine, qui fait dépendre la navigation de la volonté de l'Etat riverain ou des Etats riverain[s]. Cette conception... consistait à limiter la libre navigation aux trajets sans transbordement vers la mer ou en provenance de celle-ci.
La doctrine, quant à elle, semble à peu près unanime: en Amérique latine, il n'existe pas de liberté de navigation en l'absence de concession unilatérale ou de disposition conventionnelle."[97]

2.18 The way in which this text is presented in NCM is typical of Nicaragua's method of "editing" quotations. The truncated version suggests that the German-Venezuelan Claims Commission headed by Umpire Duffield had asserted, in *Faber*, that the Latin-American conception of navigation on international watercourses was that such navigation depended on the will of the riparian States, but also that that conception tended towards limiting navigation by other States to transit to and from the sea without transhipment. According to its own version of the text, Nicaragua comments (i) that there is not in Latin America, on the international level, any right of navigation for foreign ships, but also (ii) that such a right does exist, but only in respect of navigation to and from the sea without transhipment.[98] These two assertions are contradictory. The full citation shows that what the Umpire had in mind was an alternative: either there was, internationally, no right to navigate at all; or, if there was such a right, it was limited to access to and from the sea without transhipment. Thus Duffield left the question of the existence of a right of navigation open. In any event, the *Faber* case cannot serve as a precedent as it concerned a successive rather than a contiguous watercourse. What is more, the watercourse system in issue

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[96] L. Caflisch, "Règles générales du droit des cours d'eau internationaux", (1989) 219 *Recueil des cours de l'Académie de droit international de La Haye* 9, 125.

[97] NCM, para. 4.1.14.

[98] NCM, paras. 4.1.14-4.1.15.

– the Catatumbo/Zulia – was not an international river with a boundary running along the bank of one of the riparian States.

(3) The San Juan as a Boundary River

(a) The nature of the boundary in the Lower San Juan Area

2.19 In its Counter-Memorial, Nicaragua contends that "[t]he San Juan is not a border river but an integral and indivisible part of the Republic of Nicaragua and thus runs along its whole course within Nicaraguan territory."[99] Pursuing the argument, it points out that the upper part of the watercourse lies entirely in Nicaraguan territory while, regarding the lower course between Punta de Castilla and a point three miles below Castillo Viejo, the boundary separating Nicaragua from Costa Rica runs on the right – Costa Rican – bank of the River.[100]

2.20 From the geographical viewpoint this description is correct. From Lake Nicaragua down to a point three miles below Castillo Viejo, the San Juan is part of Nicaraguan territory, the border consisting of straight lines roughly parallel to the south bank of the San Juan. Below that point the limit follows the Costa Rican bank of the watercourse. From a macro-geographical viewpoint, the San Juan, on its upper course, forms a successive river; from the point below Castillo Viejo to Punta de Castilla, it is a contiguous river forming the boundary between the two States.

2.21 Thus the boundary runs along the right bank of the River belonging to Costa Rica. This is what causes Nicaragua to speak of a watercourse which "is not a border river" but an "integral" and "indivisible" part of Nicaragua's territory.[101] But its position is untenable. The banks are part and parcel of the River. Without banks defining it, there would be no watercourse. This is why those who have studied the subject consider borders running on riverbanks to be *river* boundaries, as they also do in the cases of condominial rivers and waterways divided by *thalweg* or median or other lines, running on water.[102]

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[99] NCM, para. 1.1.4.

[100] *Ibid.*

[101] *Ibid.*

[102] See, among others, L. Bouchez, "The Fixing of Boundaries in International River Boundary Rivers", (1963) 12 *International and Comparative Law Quarterly* 789; F. Schröter, "Les systèmes de délimitation dans les fleuves internationaux", 1992) 38 *Annuaire français de droit international*

All these types of limits, including those placed on riverbanks, are river boundaries. They must be distinguished from boundaries drawn *by reference* to waterways, which remain land boundaries. A good example is provided by the boundary separating Senegal from The Gambia which, according to the Agreement between Great Britain and France of 10 August 1889, runs parallel to the Gambia River at a distance of ten kilometres.[103] The same technique had previously been used, according to one author, in a 1555 arbitration between the Swiss cantons of Schaffhouse and Zurich in relation to the Rhine and its bridges,[104] as it was in the 1858 Cañas-Jérez Treaty for the *upper* part of the San Juan.

2.22 It may not always be easy to distinguish between boundaries *on a riverbank* (river boundaries) and boundaries drawn *by reference* to rivers. There is the old and well-known instance of the Treaty of Andrinople between Turkey and Russia of 14 September 1829, Article III of which placed the border on the Turkish bank of the Danube but also prescribed that the Turkish shore was to remain uninhabited "for a distance of two hours from the river" – whatever that may mean.[105] At first glance, this border may appear to be one drawn *by reference* to a river. This is not the case, however: the border was established on the Turkish bank and therefore was a *river* boundary. The prohibition to settle the Turkish territory within a certain distance from that bank was based on security reasons and had no impact on the boundary itself, nor on its characterisation as a river boundary. Other difficulties arise when the boundary runs, not along the water-mark but at a specified distance from it, for instance landward of a towing path along the watercourse.[106]

2.23 There can be no doubt as to the present situation however: the boundary drawn by the Cañas-Jérez Treaty follows the average water-line of the right bank of the San Juan and is therefore, unquestionably, a *river* boundary. Nothing

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948; C. Rühland, "Grenzgewässer", in H.J. Schlochauer (ed.), *Wörterbuch des Völkerrechts*, Vol. 1 (Berlin: De Gruyter, 1960), 705, 705-6. See also K.H. Kaikobad, *The Shatt-al-Arab Boundary Question: A Legal Reappraisal* (Oxford: Clarendon Press, 1988).

[103] 172 CTS 185.

[104] Schröter, 954 n.135.

[105] 80 CTS 83

[106] On this question see P. Guggenheim (ed.), *Répertoire suisse de droit international 1914-1939*, (Bâle: Helbing & Lichtenhahn, 1975), Vol II No. 5-24.

could be clearer to everybody – except to Nicaragua, which blithely asserts that "the river does not, of course, constitute the border, which lies on the right, or Costa Rican, bank in this sector."[107] Why does the respondent State insist that that border is a *land* boundary and that, consequently, the whole San Juan is a domestic watercourse? One can only surmise that this is meant to stress the absolute character of Nicaragua's sovereignty over all the River's waters, the limited scope of the rights of navigation attributed to Costa Rica in 1858, the "grant" of certain navigation privileges to Costa Rica *ex gratia*, and the virtual dependence of those rights and the attendant privileges on Nicaragua's will. All this is not very relevant, however, since the lower San Juan has been shown to be a *boundary river*.

(b) The practice of establishing boundaries on riverbanks

2.24 In earlier times treaties fixing boundaries on riverbanks were relatively frequent.[108] They occurred mainly in Africa,[109] but also in Europe[110] and in the Americas.[111] The best known shoreline limits in Asia are that drawn along the Amur river separating Russia from China, and the line dividing Iran from Iraq on the Shatt-el-Arab.[112] Often these instruments offered "compensation" to the

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[107] NCM, para. 4.2.20.

[108] See in particular Bouchez, 791-2; Schröter, 952-7.

[109] Articles I(2) and III(1) of the Anglo-French Protocol, 10 August 1889 (San Pedro, Tendo, Gambia/Senegal): I. Brownlie, *African Boundaries*, (London: C. Hurst, 1979), 215; Article 1 of the Agreement on British and French Possessions to the North and the East of Sierra Leone, 21 January 1895: G.F. De Martens, 23 *Nouveau Recueil Général de Traités*, 2nd Series, 3 (Great Skarcies or Kolenté); Delimitation Agreement between France and Liberia, 13 January 1911, 213 CTS 2 (for a series of rivers on the boundary between Liberia and Côte d'Ivoire), confirmed in 1961: see Brownlie, 369; Articles 7 and 8 of the Protocol of 1 July 1912 between Great Britain and France on the Definitive Demarcation of the Frontier between French Guinea and Sierra Leone, 216 CTS 217.

[110] In Europe, this technique seems to have been a Franco-Swiss specialty: Article 1 of the Treaty of Cession and Boundaries between Switzerland and France, 16 March 1816: 65 CTS 447 (Foron); Convention between Switzerland and France for the Definition of the Frontier between Mont Dolent and Lac Léman, 10 June 1891: 175 CTS 169 (Morge, Eau Noire, Barberine); Articles I, II and V of the Convention between France and the Bishop of Bâle, 20 June 1780: 47 CTS 331 (Doubs). See also F. Schröter, *Les frontières de la Suisse: questions choisies* (Geneva: Schulthess Médias Juridiques, 2007), 208-223. Another European case to be mentioned is the River Netze, see Article II of the Treaty between Poland and Russia, 18 September 1773: 45 CTS 243; Bouchez, 801.

[111] See Article 8 of the Treaty of Peace, 10 August 1797 between France and Portugal, which concerns the South-American river Vincent Pinson: 54 CTS 141; the Arbitral Award of 23 January 1933, following the Arbitration Treaty between Honduras and Guatemala, 16 July 1930, 137 LNTS 258 (Tinto, Motagua); and, naturally, the Cañas-Jérez Treaty of 1858: CRM, Annexes, Vol 2, Annex 7.

[112] Article 2 of the Treaty between Afghanistan and Britain for the Establishment of Neighbourly Relations, 22 November 1921: 14 LNTS 67 (Kabul river); Article 2 of the Frontier Treaty between the Netherlands and Britain, 26 March 1928: 108 LNTS 331 (the Odong river in Borneo). Regard-

States on whose banks the boundaries ran.[113] Generally speaking such borders, in view of their "inequality", do not last very long, provoke quarrels and are replaced by boundaries on the watercourse.

2.25 An author has identified several reasons that have prompted States to draw boundaries on riverbanks.[114] In the case of the Foron, for instance, the boundary dividing France from Switzerland was drawn on the Swiss shore because many of the concessions for the operation of mills in the area were localised on the French side.[115] Another motivation could be the instability of the river-bed, as was the case of the Morge, also located at the French-Swiss border, a torrent that brusquely swells or decreases, without warning, often changing course but staying within its banks; a shoreline limit was thought to offer the most practical solution. Finally, there is the political inequality of the parties which may make it possible for one of them to appropriate the whole waterway[116] – a situation which prompted Paul de Lapradelle to describe the shoreline border as "the imperialists' river boundary par excellence" ("*limite*

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ing the Amur river, see Article I of the Treaty of Peking, 2/14 November 1860 between Russia and China (123 CTS 125), to which a map had been annexed showing the boundary to be on the Chinese bank. In 1992 the issue was apparently been settled in favour of the *thalweg*: see Schröter (1992) 956 n.54. The Shatt-el-Arab separates Iran from Iraq. The Treaty of Erzerum, 19 May 1847, 101 CTS 85 fixed the boundary on the Persian bank. Article 2 of the Boundary Treaty, 4 July 1937, 190 LNTS 241 moved it to the *thalweg*. The 1937 Treaty was denounced by Iran in 1969. On 3 June 1975, the Treaty Concerning the State Frontier was concluded between Iran and Iraq: 1017 UNTS 55. This instrument was in turn denounced when Iran invaded Iraq. At the end of the war, which lasted for eight years, the peace negotiations stalled precisely on this point. The issue was finally settled on the basis of a letter addressed by Tarek Aziz to the Secretary-General of the United Nations on 14 August 1990. See C.R. Symmons, "L'Echange de lettres de 1990 entre l'Irak et l'Iran: un règlement définitif du différend et du conflit?", (1990) 36 *Annuaire français de droit international* 229, 244-6.

[113] See the following previously cited agreements: Convention of 20 June 1780 regarding the Doubs (right for the Bishop of Bâle to float wood); Treaty of 22 November 1921 regarding the Kabul river (right to navigate and to draw water for domestic and irrigation purposes); Treaty of Erzerum of 19 May 1847 on the Shatt-el-Arab ("fullness of rights of navigation" from the mouth to the point of encounter of the boundaries of Turkey and Persia"); and the Agreement of 1 July 1912 on the Sierra Leone boundary referred to in CRM, para. 4.127.

[114] See, *e.g.*, Article 8 of the Treaty of Cession and Boundaries, 16 March 1816, between Switzerland and Sardinia, which places in the middle of the Rhône river a limit which had hitherto followed the Swiss bank: see Schröter (1992) 956. Another example cited by Schröter is the *Procès-verbal* of 25 June 1903 on the Boundary Rivers Separating Liberia from Sierra Leone (Brownlie, 383); by the Convention of 21 January 1911 (*ibid*, 386), the boundaries on the three watercourses were moved from their shores to the *thalweg*. And by the Boundary Treaty of 4 July 1937 the boundary on the Shatt-el-Arab was transposed from the Persian bank to the *thalweg*.

[115] Schröter (2007), 210 (citing Ch. Rousseau).

[116] Bouchez, 791.

fluviale impérialiste par excellence").[117] Limits on the shore are not simply relics of the colonial past, however, since the technique was used by European nations, notably France and Switzerland.

2.26 In the instant case, political reasons were involved, as were the circumstances prevailing in and around 1858. The two States could be considered as partly dependent on two competing major powers: Nicaragua on the United States, Costa Rica on the British Empire. It was the wish of these powers to be able to negotiate and build the planned canal with the permission of one rather than two "local countries"; and this could be achieved by attributing the existing waterway to one of them. Some *quid pro quo* had, however, to be offered to the other – Costa Rica – which was accorded free navigation and a share in the River's management and protection; moreover Nicaragua was obliged at least to inform and consult Costa Rica regarding canal projects[118] – a duty it neglected when, on 5 August 1914, it concluded the Bryan-Chamorro Treaty with the United States.[119]

2.27 The shared interest of Costa Rica and Nicaragua in the building of an inter-oceanic canal can be seen from other contemporaneous documents, which indicate that the 1858 Treaty was entered into with both States having in mind that a better arrangement would be put in place once the canal was built, an arrangement for joint sovereignty in the waters of the River and equal rights of navigation. It also indicates that Costa Rica's perpetual right of free navigation was an important factor in the bargain eventually agreed in the 1858 Treaty and not, as Nicaragua suggests,[120] merely incidental to the determination of the boundary. The successful conclusion of the 1858 Treaty, which was signed in San José on 15 April 1858 with ratifications exchanged in Rivas on 26 April 1858, was intimately connected with the canalization Convention between Nicaragua, Costa Rica and Félix Belly, signed on 1 May 1858 in Rivas.[121]

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[117] *La frontière* (Paris, Editions internationales, 1928), 187.

[118] Article VIII of the Cañas-Jérez Treaty: CRM, Annexes, Vol 2, Annex 7.

[119] CRM, Annexes, Vol 2, Annex 20.

[120] See NCM, para. 1.2.6.

[121] Nicaragua-Costa Rica-F Belly, Convention relative to the Concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua, (Mora-Martínez-Belly), Rivas, 1 May 1858: CRM, Annexes, Vol 2, Annex 8. Additional articles are included in CRR, Annexes, Vol 2, Annex 12. The complete Convention is produced in CRM, Complete Copies of Certain Annexes, Vol 1, Annex 8.

Article 4 of the Nicaragua-Costa Rica-Belly Convention expressly provided that the boundary between Costa Rica and Nicaragua would be the canal. It stated:

> "Dans le cas où le tracé partant de l'embouchure de la Sapoa sur le lac de Nicaragua, et aboutissant à la baie de Salinas sur le Pacifique, serait reconnu praticable par les ingénieurs, ce tracé sera choisi de préférence par la Compagnie pour aboutir du lac de Nicaragua au Pacifique, et par le fait même, le canal deviendra dans toute sa longueur la limite définitive des États de Nicaragua et de Costa-Rica. Dans le cas contraire, cette limite restera ce qu'elle est aujourd'hui, sauf règlement ultérieur."[122]

Although this Convention never came into force, and the canal has never materialised, it goes some way to explaining the *quid pro quo* of the 1858 Treaty and explains that Costa Rica's perpetual right of free navigation was an important factor in the negotiation of the boundary between the two States.[123] It also gives an indication of the context and considerations which led the parties to indicate the boundary on the bank of the River.

2.28 It remains to examine the medium- and long-term consequences of drawing international river boundaries on the shore of one of the riparian States. As pointed out by Bouchez:

> "[t]he great injustice of this type of boundary in comparison with the first-mentioned one [the river as a *condominium*] is that one of the border States is excluded from the use and exploitation of the river; for this reason, the delimitation of one of the banks as the boundary line for rivers has not often been applied in this century."[124]

2.29 The establishment of a boundary on the shoreline may be accompanied by the concession of "compensatory" rights. In the case of non-navigable watercourses, they may consist of fishing privileges, as for instance in Article 8 of the Agreement of 1 July 1912 on the Boundary between Guinea and Sierra Leone.[125] Such rights can also result, as is the case here, from local customs based on long-established practice.

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[122] CRR, Annexes, Vol 2, Annex 12, Article 4. See also Article 25 and discussion in this Reply, Appendix, paragraphs A.15-A.22.

[123] This is consistent with the account of Félix Belly, who was present for negotiations of both the 1858 Treaty and the canalization Convention: see F. Belly, *A Travers L'Amérique Centrale: le Nicaragua et le Canal Interocéanique*, Tome Second (Paris: Librairie de la Suisse Romande, 1867), 150-165, esp. 152-5. Pages 150-165 are included as CRR, Annexes, Vol 2, Annex 66. See further discussion in this Reply, Appendix, paragraphs A.15-A.22.

[124] Bouchez, 792.

[125] Protocol of 1 July 1912 between Great Britain and France on the Definitive Demarcation of the Frontier between French Guinea and Sierra Leone, 216 CTS 217.

2.30 The effect of placing an international boundary on the shore of a *navigable* river may be particularly dramatic, and it may prove necessary – unless there is a clear customary rule allowing for free navigation by all countries, or at least all riparian States – to grant the co-riparian a right of free navigation for ships flying their own flag, especially if the watercourse is an important means of communication, as is the case here. This is even truer if, as in the present instance, the State on whose shore the boundary is located participates in the protection of the River and of its navigation. A largely formal right of navigation such as that advocated by Nicaragua is, in practice, no right at all. On the contrary, the "perpetual right of free navigation" enjoyed by Costa Rica must be interpreted so as to be meaningful, and not be appreciated exclusively by, and in the interests of, the neighbour exercising sovereignty over the River's waters. This must be accomplished in a way which renders the other State's rights effective and allows it to discharge its obligations: *ut res magis valeat quam pereat*. The reference to "free" navigation provides support for this position.[126]

2.31 Limits on the shore cannot be considered "good" boundaries because they tend to generate conflict rather than to promote peaceful coexistence. The fates of the Shatt-el-Arab and of the Amur River bear out this point. Sooner or later shoreline borders are apt to be replaced by *thalweg* or median lines.[127] The changes in the borders of the two rivers have been described already.[128]

2.32 Despite these drawbacks, Costa Rica, mindful of the importance of maintaining peaceful relations with all countries, especially its neighbours, has never sought a revision of the Cañas-Jérez Treaty but has limited itself to asking for what it was entitled to under that Treaty, no more and no less. Costa Rica can make do with the Treaty as it is, provided it is interpreted fairly and objectively. What it cannot accept is Nicaragua's insistence on being allowed to give the "perpetual right of free navigation" stipulated by the Treaty the meaning that best serves Nicaragua's own interest, subordinating Costa Rica's right to Nicaragua's sovereignty over the waters of the River. "Sovereignty" is not boundless, especially if it is limited by treaty.

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[126] See below, paragraphs 3.08-3.35.

[127] See this Reply, paragraphs 2.24-2.25 above.

[128] See this Reply, paragraphs 2.25 above.

2.33 To conclude, since the border on the San Juan is placed on the Costa Rican shore of the watercourse, the latter is a *boundary river*. By way of compensation for its disadvantaged position, Costa Rica is granted a "perpetual right of free navigation" on the lower course of the San Juan on the basis of Article VI of the Cañas-Jérez Treaty. To be of any use to Costa Rica, the scope of that right must be determined fairly and objectively – as was done by President Cleveland himself and by the Central American Court of Justice. That determination must take account of the handicap suffered by Costa Rica on account of the boundary's location on its bank of the River.

(4) The San Juan as an International River

(a) Elements traditionally associated with International Watercourses

2.34 "The San Juan is of course not an international River since it flows entirely within one country and besides is subject to a special Treaty Regime."[129] This passage, cited earlier, runs through the Nicaraguan argumentation like a *Leitmotiv*. That, on account of the boundary being located on the Costa Rican bank, the San Juan is a boundary river has already been demonstrated. But the proposition that the River is not an international watercourse because it is the object of a special (international) treaty regime is entirely novel. By the same token – because they are governed by treaties – the Nile, the Paraná and the Mekong, too, would not be international rivers.

2.35 According to Costa Rica,[130] three elements are traditionally associated with the existence of international watercourses: (i) the presence of different riparians; (ii) the fact that the watercourse, if navigable, offers access to and from the sea to more than one State; and (iii) the existence of a treaty regime.

2.36 To qualify as an international watercourse, a river does not invariably have to fulfil all three conditions. But the San Juan fulfils them all. It is therefore, unquestionably, an *international* as well as a *boundary* river.

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[129] NCM, para. 4.1.29.

[130] CRM, Appendix A, paras. A.8, A.18.

(b) Consequences of the San Juan River's characterisation as an international boundary river

2.37 The characterisation of the San Juan as an international boundary watercourse entails that the rules of general international law apply to it unless they are pre-empted by treaty rules or binding decisions (here the Cleveland Award and the Judgment of the Central American Court of Justice). It also entails the applicability of the general rules on territorial sovereignty pursuant to which the respondent State exercises sovereignty over the waters of the San Juan, always subject to its international obligations.

2.38 The Treaty and the pertinent arbitral and judicial rulings must be appreciated in the light of the rules of interpretation laid down by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969.[131] The interpretation of the provisions of the 1858 Treaty must take account of the rules of general international law relating to watercourses and the circumstances surrounding that Treaty, including the fact that the boundary runs on the Costa Rican bank. The rules of interpretation in question do not in all respects correspond to those invoked by Nicaragua in the present controversy.

2.39 This is true for the assertion that the 1858 Treaty and the perpetual right of free navigation stipulated by its Article VI must be interpreted bearing in mind the "legitimate interests" of Nicaragua.[132] This argument is premised on the assumption that the Cañas-Jérez Treaty emphasises Nicaragua's sovereignty over the waters of the San Juan, Costa Rica's right to navigate being but a minor element the definition and exercise of which must be subservient to Nicaragua's sovereignty. This line of argument would reduce Costa Rica's perpetual right of free navigation to little more than an empty shell. The truth is, of course, that the provisions of the 1858 Treaty are to be interpreted in the interests not of one but both parties. This is what is meant by "fair" and "objective" interpretation.

(c) Conclusions

2.40 Contrary to the views of the respondent State, the San Juan is a boundary river subject to an international treaty regime attributing a "perpetual right of free navigation" to Costa Rica. Consequently the rules of general international law apply, especially those governing the interpretation of treaties.

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[131] On this point, cf. also NCM, para. 2.1.12.

[132] NCM, para. 2.1.50.

C. The Applicable Principles of Interpretation

2.41 In its Counter-Memorial, Nicaragua makes a considerable effort to show that the object and purpose of the Treaty of Limits "was to settle a long-standing dispute concerning title to territory".[133] For Nicaragua, "[t]he main focus was thus the determination of boundaries and not the creation of a regime of fluvial navigation for the States of the region."[134] The purpose of this effort is to minimise the scope of the right of navigation over the San Juan, a right recognised to Costa Rica at the same time of the grant of sovereignty over the River's waters and as a condition or limitation to that grant of sovereignty.

2.42 This section will rebut the Nicaraguan presentation, as well as its misuse of the general principles of interpretation. It will show that Nicaragua's interpretation of the object and purpose of the Treaty of Limits does not correspond to reality, that the way in which Nicaragua portrays the relevant rules of interpretation and application of treaties is not accurate and that, even if Nicaragua's position was correct, the result would be the same, i.e. Article VI of the Treaty of Limits refers to "purposes of commerce," not "articles of trade," and the Second Article of the Cleveland Award clearly recognises Costa Rica's right to navigate with public armed vessels (provided that they are not vessels of war) for the exercise or the protection of navigation for purposes of commerce.

(1) All principles of interpretation confirm Costa Rica's views

2.43 Nicaragua refers to the relevance of intertemporal law in the present case, mixing up this concept with that of contemporary interpretation of treaties, i.e. that a treaty must be interpreted taking into account the rules and the context prevailing at the time of its conclusion.[135]

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[133] NCM, para. 2.1.1.

[134] NCM, para. 2.1.9.

[135] NCM, para. 2.1.13.

2.44 The notion of intertemporal law was authoritatively explained by Max Huber as sole arbitrator in the *Isle of Palmas* case. In the terms of the arbitral award:

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."[136]

2.45 The relevance of the second rule of the intertemporal law ("the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law") must be stressed here. There is no doubt that the "continued manifestation" of the perpetual right of free navigation for purposes of commerce attributed to Costa Rica in 1858 is in conformity with the conditions of contemporary international law. This right, conventionally recognised to Costa Rica in 1858, is not in contradiction with the evolution of general international law regarding the right of navigation of riparian States in international waterways; in addition this same general international law must be taken into account when interpreting the "continued manifestation" of Costa Rica's right.

2.46 To the extent of the interpretation of the relevant clause of the Treaty of Limits through time, Nicaragua admitted that what is "*objetos de comercio*" today is included in the rights conferred on Costa Rica by the Treaty of Limits in 1858. Certainly, Nicaragua contends that "*objetos de comercio*" only means merchandise or goods, but the fact remains that Nicaragua has accepted the interpretation of this phrase as not being limited to what were "*objetos de comercio*" exclusively at the time of the conclusion of the Treaty.[137] Hence, the parties agree that all "*objetos de comercio*" as they exist today, are included within Costa Rica's perpetual right of free navigation.

2.47 As a matter of logic as well as law, the same criteria that Nicaragua applies to Article VI of the Treaty of Limits must be applied to the Second

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[136] *Isle of Palmas Case*, Arbitral Award of 4 April 1928, Vol. II *UNRIAA*, p. 845.

[137] "It would be unreasonable to seek a limitation to only the products concerned in 1858.": NCM, para. 4.3.24; see also NCM, para. 4.3.23.

Article of the Cleveland Award. Consequently, what are considered today as vessels of the Revenue Service enjoy the same right as it was recognised by the interpretation given by President Cleveland to the Treaty of Limits in 1888.

2.48 Formally, Nicaragua acknowledges that the provisions of Article 31 of the Vienna Convention of the Law of Treaties reflect customary international law and must be applied in the present case.[138] However, some paragraphs later, Nicaragua tries to focus on the need to "discover the thoughts of the author" in order to interpret purported "obscure passages" of treaties.[139] Clearly, Nicaragua is inviting the Court to depart from the main means of interpretation depicted in the first paragraph of that Article: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

2.49 The extraordinary emphasis put by Nicaragua on what is considered as "supplementary means of interpretation" in Article 32 of the Vienna Convention of the Law of Treaties, as though they were rather the main means of interpretation, indicates that Nicaragua is well aware that the general rule of interpretation contained in Article 31 inexorably leads to the recognition of the Costa Rican rights that are being violated by Nicaragua. Furthermore, as will be demonstrated below, the application of Article 32 confirms the interpretation given to the Treaty of Limits by Costa Rica.

2.50 The first principle of interpretation is that of good faith. In view of the fact that Nicaragua itself explicitly interpreted for more than a century "*con objetos de comercio*" as meaning "for purposes of commerce", it is clear that pretending today, as Nicaragua does, that the phrase refers only to the transport of merchandise does not correspond to a good faith interpretation.

2.51 Secondly, the interpretation must correspond to the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. As this Court stated even before the adoption of the 1969 Vienna Convention, "the words are to be interpreted according to their natural and ordinary meaning in the context in which they occur."[140]

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[138] NCM, para. 2.1.12.

[139] See the quotations at NCM, paras. 2.1.16 and 2.1.17.

2.52 The ordinary meaning of the phrase "*con objetos de comercio*" in its context (both "internal" and "external") is the one the parties have explicitly admitted for more than a century: "for purposes of commerce." Nicaragua's interpretation of this phrase as meaning "with articles of trade" does not correspond to the ordinary way to refer to merchandise. The internal context (other articles of the same treaty) indisputably shows that "*objetos*" was used as "purposes".[141] So does the external context, i.e. other relevant treaties concluded by the parties referring to Costa Rica's navigation, such as the Treaties concluded by Nicaragua with the United States in 1857, with France in 1859 and with Great Britain in 1860, all of them clearly stipulating that Costa Rica's Government and citizens enjoy free passage through the San Juan, which passage included both "*persons and property*", not exclusively "articles of trade."[142]

2.53 Nicaragua presents the several diplomatic attempts to settle the disputes between the two countries after 1821 as being *travaux préparatoires* of the Treaty of Limits of 1858.[143] Some of these attempts ended up in the signature of treaties, although they were not ratified and consequently never entered into force.[144] But they are not *travaux préparatoires*. In any event, contrary to what Nicaragua now claims, the previous unratified treaties and other diplomatic exchanges do not support an interpretation of the phrase "*con objetos de comercio*" as meaning exclusively transport of goods or as excluding transport of passengers, as will be shown below.

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[140] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand), Preliminary Objections, Judgment of 26 May 1961*, ICJ Reports 1961 p. 17 at p.32.

[141] See Article VIII of the Treaty of Limits: CRM, Annexes, Vol 2, Annex 7.

[142] United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), 16 November 1857, Article XX (CRR, Annexes, Vol 2, Annex 10); France-Nicaragua Treaty of Friendship, Commerce and Navigation (Sartiges-Maximo Jerez), 11 April 1859, Article XXXIII (CRR, Annexes, Vol 2, Annex 14); Great Britain-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lennox Wyke-Zeledon), 11 February 1860, Article XXVI (CRR, Annexes, Vol 2, Annex 15).

[143] NCM, para. 1.3.1.

[144] Wrongly, Nicaragua affirmed that "None [of these treaties] were *valid*" (emphasis added, NCM, para. 1.3.1).

2.54 This may be illustrated by the reliance placed by Nicaragua on Article V of the Cañas-Juarez Treaty of 6 July 1857[145] which preceded the 1858 Cañas-Jérez Treaty and was not ratified by Costa Rica.[146] The 1857 Treaty referred to "*articulos de comercio*", whereas Article VI of the 1858 Treaty uses the expression "*objetos de comercio*". To Nicaragua this supports the thesis that "*objetos*", like the term "*articulos*" used in 1857, refers to "commodities" rather than "purposes".[147] This can be turned around to establish the exact opposite: "*articulos*" was replaced by "*objetos*" because Costa Rica, dissatisfied with a narrow right in matters of trade, insisted on the broader term. This demonstrates that reliance on the text of prior and unratified treaties is hazardous. If anything can be said at all, it is that if one party fails to ratify a treaty, one may presume that it was dissatisfied and wanted a new text having a meaning *different* from that of the previous unratified one. Moreover, Article V of the Treaty of 1857 contained both a reference to navigation (without any particular qualification) *and* a reference to transport of "*articulos de comercio.*" This distinction between *navigation* and *transport* of "*articulos de comercio*" shows that navigation was not confined to the transport of commodities; rather Costa Rica had a general right of navigation *plus* the right to transport articles of trade. This invalidates Nicaragua equation of *transport* of "*articulos de comercio*" (1857) with *navigation* "*con objetos de comercio*" (1858).

2.55 Subsequent practice and agreements between the parties also confirm that the phrase "*con objetos de comercio*" means "for purposes of commerce". During the arbitral proceedings leading to the Cleveland Award, there was agreement by the parties in translating that phrase as "for purposes of commerce". This amounts to a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties. As recalled in this Reply, the transport of persons, mail and goods in general from the Atlantic to the interior of Costa Rica during the period largely used the San Juan.[148] The 1956 Agreement, while referring to the facilitation and expedition of traffic in the San Juan, also confirms the natural interpretation of Article VI of the Treaty of Limits as being "for the purposes of commerce".

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[145] CRM, Annexes, Vol 2, Annex 5.

[146] NCM, para. 4.3.9.

[147] NCM, para. 4.3.19.

[148] CRM, paras. 4.58-4.72; see also this Reply, paragraphs 3.76-3.78.

2.56 Taken together, the principle of good faith interpretation, the antecedents of the 1858 Treaty of Limits and subsequent practice all show that "*con objetos de comercio*" must be interpreted as "for purposes of commerce" and hence cannot be read as being confined to navigation "with articles of trade." As will be seen below, the ordinary meaning of the relevant words in their context yields this result.[149]

(2) Nicaragua's focus on sovereignty and its invocation of a restrictive interpretation of the right of free navigation

2.57 Nicaragua acknowledges that Costa Rica's right of free navigation is a qualification of Nicaragua's "*dominio y sumo imperio*" over the waters of the San Juan River.[150] Nicaragua states:

> **"The right of free navigation appears as a *qualification of the sovereignty of Nicaragua* and is introduced by the term 'pero' (but). Thus a particular right of Costa Rica is presented as a qualification of the general grant of rights (in the form of title (dominio) and sovereignty ('sumo imperio') to Nicaragua."[151] (Emphasis added.)**

2.58 This admission is revealing, since it confirms that it is Nicaragua's "*dominio y sumo imperio*" which is limited by Costa Rica's perpetual right of free navigation, and not the opposite, as Nicaragua later attempts to argue by claiming a regulatory power over Costa Rican navigation on the San Juan River. Nicaragua tries to justify such purported regulatory powers over Costa Rican navigation by reference to (a) political and legal considerations and (b) safety of navigation.[152] None of these arguments, however, follow from the 1858 Treaty of Limits or the Cleveland Award that interprets it. As Nicaragua acknowledges, the rights and obligations of the parties in the present case are governed, first and foremost, by the 1858 Treaty of Limits.[153]

2.59 Nicaragua argues that since the perpetual right of free navigation for purposes of commerce is a limitation to the sovereignty of Nicaragua over the waters of the San Juan, the Costa Rican right must be interpreted restrictively.[154]

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[149] This Reply, paragraphs 3.39-3.78.

[150] See NCM, para. 2.1.48.

[151] NCM, para. 2.1.48.

[152] NCM, para. 2.1.50.

[153] See NCM, para. 3.1.1.

[154] See, for example, NCM, para. 2.1.51.

But such a "restrictive interpretation" does not correspond to any existing rule of treaty interpretation. Case-law cited by Nicaragua itself insists that a so-called restrictive interpretation can only be invoked in cases of doubt. There is no such doubt here. Since Nicaragua produced accommodating truncated quotations, it is worth recalling them in full.

2.60 Nicaragua cites *The Wimbledon* but unavailingly. For the Permanent Court:

> "Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, *the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal.* This fact constitutes a sufficient reason for restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But *the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.*"[155] (Emphasis added. Nicaragua omitted the final sentence of this quotation.)

2.61 In the present case Nicaragua presents itself as in a situation akin to that of Germany in the *Wimbledon* case. No one disputes its sovereignty over the waters of the San Juan. But the fact remains that Nicaragua agreed to submit to an important limitation of the exercise of its sovereign rights over those waters. The "so-called restrictive interpretation" (as the Permanent Court referred to it) Nicaragua invokes today is "contrary to the plain terms of the article [VI of the Treaty of Limits] and would destroy what has been clearly granted" to Costa Rica by it as a condition on and concomitantly to the attribution of Nicaragua's sovereignty over the River.

2.62 Nicaragua's position on "restrictive interpretation" can also be compared to that adopted by Turkey in the *Mosul* case:

> "This argument [of the Turkish Government] appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound. In the present case,

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[155] *The S.S. "Wimbledon"*, PCIJ Reports, Series A No. 1, 17 August 1923, pp. 24-25, partially quoted in NCM, para. 3.3.8.

however, the argument is valueless, because, in the Court's opinion, the wording of Article 3 is clear."[156]

2.63 The situation depicted by the Permanent Court in the *Mosul* case is transposable here. The argument of the restrictive interpretation of the rights and obligations of the parties has no value, because the wording of Article VI of the Treaty of Limits is clear: it attributes to Costa Rica a perpetual right to free navigation for purposes of commerce.

2.64 The Permanent Court also shed light on the issue of "restrictive interpretation" in the *River Oder* case in a manner relevant to the present dispute:

> "Nor can the Court, on the other hand, accept the Polish Government's contention that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of States. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that interpretation should be adopted which is most favourable to the freedom of States."[157]

2.65 Hence the "so-called restrictive interpretation", assuming such a principle to exist, would only be applied if "in spite of all pertinent considerations", i.e. the application of the other relevant methods of interpretation depicted in Articles 31 and 32 of the Vienna Convention of 1969, the result would still remain doubtful. Nicaragua has not demonstrated that this is the case.

2.66 In truth, there is no room for any *principle* of restrictive interpretation: the issue is one of context. The present Court has clearly indicated the way in which a word must be interpreted either in a wide or in a restrictive way, by stating that "[t]he word obtains its meaning from the context in which is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the

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[156] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, PCIJ Reports, Series B No. 12, 21 November 1925, p. 25.

[157] *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ Reports, Series A No. 23, 10 September 1929, p. 26.

context in which it is used so requires."[158] In the present case, the context pleads for an interpretation giving effect to the ordinary meaning of "*con objetos de comercio*", that is an interpretation including transport of both persons and goods.

(3) Costa Rica's right of navigation on the San Juan was simultaneous with the establishment of Nicaraguan sovereignty over the waters of the River

2.67 Nicaragua's attempt to present itself as the loser in the bargaining leading to the Treaty of Limits of 1858 has no historical basis. Its presentation of the *quid pro quo* leading to the 1858 Treaty unjustifiably minimizes the importance of Costa Rica's perpetual right of free navigation, as explained in the Appendix to this Reply.[159] Despite the fact that Nicaragua attached importance to Rives' Report, it ignores the fact that Rives himself declared in that Report:

> **"that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guaranties' of the 8th March, 1841 – which asserts as the boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua, and the River San Juan."[160]**

2.68 Nicaragua mentions previous bilateral treaties signed in order to settle unresolved questions but never ratified. These unratified treaties are part of the history leading to the conclusion of the Treaty of Limits in 1858, but Nicaragua's presentation of them is misleading. Nicaragua mentions the Marcoleta-Molina Treaty of 1854, which "clearly recognizes that the River San Juan is entirely within Nicaragua."[161] But that Treaty contained a provision stating that "both parties agree that the border *should be*" the San Juan. This is no way to declare a purported pre-existing sovereignty over the River, as Nicaragua claims. The Treaty contained another provision by which "Costa Rican citizens shall have the power to freely come in and out through the port of San Juan with their ships and goods and navigate, except by steamboat, on the river bearing the same

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[158] ***Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion*, I.C.J. Reports 1960, p. 150 at p. 158.**

[159] **See discussion above, this Reply, paragraph 2.27 and below, Appendix, paragraphs A.15-A.22.**

[160] **NCM, Vol II, Annex 70; also see NCM, para. 2.1.24.**

[161] **NCM, para. 2.1.27.**

name…"[162] Clearly, the 1854 Treaty acknowledged a right of navigation on the San Juan including both persons and goods: Nicaragua fails to mention it. The unratified Marcoleta-Molina Treaty is consistent with Costa Rica's claim that the *quid pro quo* of the 1858 Treaty balanced Nicaragua's sovereignty in the waters of the River against Costa Rica's perpetual right of free navigation.[163]

2.69 The present case is not one in which one or more riparian States decide to set up a particular fluvial regime, granting rights to other riparians or even to non-riparians. On the contrary, this case concerns a treaty which settled a dispute with regard to sovereignty over the frontier areas of both countries, including over the San Juan River, recognising the sovereignty over the waters and one bank to one of the riparian States, and granting a perpetual right of free navigation for purposes of commerce to the other. One attribution (Nicaraguan sovereignty) is inseparable from the other (Costa Rican navigation): the condition for the acceptance of the first was the acceptance by the other party of the second.

2.70 Nicaragua's picture of a sovereign State granting a limited right to its neighbour is contradicted by the clear wording of Article VI of the Treaty of Limits, which uses the future form of the verbs dealing *both* with sovereignty and navigation:

> "The Republic of Nicaragua *shall have* [*tendrá*] exclusively the dominion and sovereign jurisdiction over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic; but the Republic of Costa Rica *shall have* [*tendrá*] the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica. The vessels of both countries *shall have* the power to land indiscriminately on either side of the river at the portion thereof where the navigation is common; and no charges of any kind, or duties, *shall be* collected unless when levied by mutual consent of both Governments."[164] (Emphasis added.)

2.71 Nicaragua's insistence on the Treaty as being one "of Limits" adds nothing to the interpretation of Article VI. The fact that a boundary treaty also contains a particular territorial regime, in this case with regard to fluvial navigation, is normal and in no way means that preference must be given to one interpretation or another. The *Kasikili/Sedudu Island case* is illustrative. While discussing "to what extent the object and purpose of the treaty can clarify the meaning to be given to its terms", the Court noted that the Treaty, although delimiting spheres of influence, was considered by the parties as determining the boundary between them: "The Court notes that navigation appears to have been a factor in the choice of the contracting powers in delimiting their spheres of influence."[165] The point here is not to compare the situation in Africa and in Central America in the 19th century, nor to distinguish between delimitations of colonies by European countries and delimitations of territories made by newly independent States such as Costa Rica and Nicaragua.[166] What is relevant here is the fact that navigation is an important element of delimitation when the delimitation concerns navigational waterways.

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[162] Article 4 of the 1854 Treaty: see NCM, Vol II, Annex 4.

[163] See discussion above, paragraph 2.27 and below, Appendix, paragraphs A.15-A.22.

[164] CRM, Annexes, Vol 2, Annex 7(b).

2.72 Moreover, Nicaragua completely overlooks the fact that the San Juan del Norte Bay is, according to Article IV of the Treaty of Limits, a common bay, that is to say, a *condominium* – or rather a *coimperium*[167] – and that the San Juan River is the only means of access to it by Costa Rica. This element is part of the internal context that must be taken into consideration when interpreting Article VI with regard to the scope of Costa Rica's navigational rights.[168]

2.73 The concomitant granting of both Nicaraguan sovereignty over the waters and Costa Rica's right of navigation in the area where Costa Rica is riparian, as well as the internal context of the Treaty of Limits, preclude Nicaragua from privileging its own sovereignty to the detriment of Costa Rican rights.

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[165] *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999, p. 1045, at p. 1073 (para. 44).

[166] Cf. NCM, para. 5.1.9.

[167] Cf. *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Reports 1992, p. 351, at pp. 597-598 (para. 399).

[168] San Juan del Norte Bay is shown in CRM, Sketch Map 5, after p. 8.

D. Conclusions

2.74 For these reasons, it may be concluded that:

(1) The San Juan is a boundary river governed by an international treaty regime attributing to Costa Rica a perpetual right of free navigation for purposes of commerce.

(2) Nicaraguan sovereignty over the waters of the River is limited by that treaty regime.

(3) Nicaragua's entire case rests upon its novel interpretation of the phrase "*con objetos de comercio*" in Article VI of the 1858 Treaty of Limits as meaning "with articles of trade." If this interpretation is wrong, as indeed it is, the entire Nicaraguan case fails.

(4) The parties agree that what are "*objetos de comercio*" today are included within Costa Rica's perpetual right of free navigation.

(5) The same criterion applies to the Second Article of the Cleveland Award of 1888: what must be considered as vessels performing revenue service activities today are entitled to navigate the San Juan as established by that Award.

(6) Nicaragua's sovereignty over the waters of the San Juan cannot be used to restrict or limit the scope and exercise of the perpetual right of free navigation recognised by the Treaty of Limits at the same time as sovereignty over the river was granted to Nicaragua.

(7) In the interpretation of the relevant articles which are at the core of the present case, there is no basis for departing from the customary rules of the interpretation of treaties, as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Chapter 3

The Scope of Costa Rica's Substantive Rights

A. Introduction

3.01 Nicaragua accuses Costa Rica of coming to the Court "seeking to obtain by adjudication what she has been unable to achieve through negotiations, that is, a revision of the 1858 Cañas-Jérez Treaty and of the Cleveland Award".[169] This is not the case. Costa Rica is simply seeking strict respect for its rights as established by the 1858 Treaty and declared by the Cleveland Award. It has never sought, nor even suggested, the revision of the Treaty of Limits or the Cleveland Award through negotiation. Quite the contrary: it was Nicaragua who first challenged the validity of the Treaty and then tried to modify its scope, either through the adoption of a new treaty or by way of its breaches based on fanciful interpretations.

3.02 A key element for the settlement of the present dispute is the scope of the expression "*con objetos de comercio*" embodied in Article VI of the Treaty of Limits. In its Memorial, Costa Rica demonstrated that this expression means "for purposes of commerce".[170] In its Counter-Memorial, Nicaragua persists in its novel interpretation of this formula as encompassing navigation only "with articles of trade", a view advanced for the first time in 1994 and contradicted by Nicaragua's own previous translations, interpretations, understanding and practice – as well as by the ordinary meaning of the phrase in its context.[171]

3.03 A second crucial element for this dispute is the scope of the navigational rights recognised to Costa Rica by the Cleveland Award in its Second Article, interpreting Article VI of the Treaty of Limits. The Award recognises the right to navigate with revenue service vessels – i.e. public armed vessels other than warships – navigating in connection with the enjoyment of purposes of commerce and as necessary for the protection of the exercise of that right of navigation. In its Memorial, Costa Rica also demonstrated that this right was exercised by public vessels – and that its exercise is now wrongfully prevented by Nicaragua.[172] Contrary to the unequivocal text of the Cleveland Award and to what Nicaragua itself contended in the arbitration proceedings, Nicaragua pretends today that President Cleveland recognised navigation by vessels of the Costa Rican revenue service only in conjunction with navigation "with articles of trade", the right in question not involving, in any event, "armed navigation".[173]

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[169] NCM, para. 4.1.4.

[170] CRM, paras. 4.17-4.72.

[171] See CRM, para. 3.17. See also above, paragraphs 1.04-1.14.

3.04 The present Chapter will focus on the extent of Costa Rica's rights under the applicable law, rebutting Nicaragua's interpretation of those rights. The following sections deal specifically with the scope of the perpetual right of free navigation (**Section B**), the key issue of the interpretation of the phrase "*con objetos de comercio*" (**Section C**) and the rights of navigation related to protection, custody and defence stemming from the Treaty of Limits as recognised by the Cleveland Award (**Section D**). **Section E** analyses Costa Rica's related rights, showing that the Nicaraguan requirement of flags for navigation, the denial to the residents of the Costa Rican bank of a customary right to fish for subsistence purposes, as well as denial of the right to land on the Nicaraguan bank where navigation is common, are unfounded; it also deals with the existence of an autonomous obligation to expedite and facilitate traffic in the San Juan, as established by the 1956 Agreement and now denied by Nicaragua. The Chapter ends with a rebuttal of the Nicaraguan argument of a purported "border courtesy" practice (**Section F**). Conclusions are drawn in **Section G**. Two tables are appended to this Chapter which show that Costa Rica's interpretation of the relevant instrument is correct: a table with the use of the term "*objetos*" as meaning "purposes" in 19th century documents (**Table 1**) and a table of terms used to refer to "articles of trade" in 19th century documents (**Table 2**).

B. A Perpetual Right of Free Navigation

3.05 In its Memorial, Costa Rica asserted that "[t]he adjective 'free' implies that navigation, i.e. movement of persons or goods along the River, shall be unqualified and unconditional."[174] A subsection of Nicaragua's Counter-Memorial is entitled "A right of *free* navigation, yes, but with *articles of trade*".[175] Nicaragua's purpose is to present Costa Rica's rights as "a narrowly-defined right of navigation by Costa Rica with articles of trade."[176] Again notwithstanding the term or the matter under discussion, in this particular case the term "free", Nicaragua's entire case rests upon its novel interpretation of the phrase "*con objetos de comercio*" as meaning "with articles of trade".

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[172] CRM, paras. 4.73-4.96. See also CRM, paras. 5.109-5.136 and CRM, Appendix B.

[173] NCM, sections 3.1. and 4.2.

3.06 This Section will rebut Nicaragua's narrow interpretation of what is clearly established by treaty as a *perpetual* right of *free* navigation. Section C addresses the meaning and scope of "*objetos de comercio*".

(1) Costa Rica's right is *perpetual*

3.07 In its Memorial, Costa Rica showed that the adjective "perpetual" refers to the temporal dimension of its right of navigation and entails a permanent, continuous, uninterrupted and enduring right.[177] Nicaragua's Counter-Memorial does not respond to this analysis. Nicaragua's silence suggests that it accepts the scope given to the term by Costa Rica. Indeed, the only occasion where Nicaragua refers to the term "perpetual" is in the context of its analysis of the unratified 1857 Cañas-Juarez Treaty, when it states – incorrectly – that this Treaty "was a reaffirmation that Costa Rica accepted to be excluded *perpetually*, from the right to transport passengers" (emphasis added).[178]

(2) Costa Rica's perpetual right of navigation is *free*

3.08 Nicaragua does not challenge the definitions of "free" given in Costa Rica's Memorial and the fact that "any limitation imposed upon navigation that by right is 'free' constitutes a denial of that right."[179] What Nicaragua argues is that this should only be true with regard to navigation with "articles of trade".[180]

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[174] CRM, para. 4.08.

[175] NCM, sub-section A of section 4.1, paras. 4.1.8-4.1.15.

[176] NCM, para. 4.1.5, a).

[177] CRM, para. 4.07.

[178] NCM, para. 1.2.40.

[179] CRM, para. 4.08; NCM, para. 4.1.10.

[180] NCM, para. 4.1.10.

3.09 In the course of its argument, quoting out of context a decision of the Costa Rican Supreme Court relating to the meaning of "freedom of commerce" in the Constitution, Nicaragua's Counter-Memorial argues that "the word 'free' does not necessarily connote an absolute and unrestricted right."[181] The comparison is futile: the Supreme Court was analysing the right of individuals to freedom of trade and not Costa Rica's right to free navigation pursuant to the 1858 Treaty and other relevant decisions and instruments. Any constitutional right conferred on an individual is exercised within the realm of internal law and is subject to any limitations and regulations stipulated by that law. Costa Rica's right of free navigation is exercised on the basis of international law and does not permit Nicaragua to establish any kind of "limitation or regulation" on Costa Rica's right, particularly in a context where Costa Rica's right of free navigation is a condition for Nicaraguan sovereignty over the waters of the River.[182] The situation is very different from that of a constitutional right granted to an individual, which is inevitably subject to limitation and regulation, as the Costa Rican Supreme Court stated.[183] In the context of the present case, there are two simultaneous rights or competences whose holders are both independent States. To use Nicaraguan own words, sovereignty is not "absolute" in this context – it is "subject to limitations" established by treaty: the perpetual right of freedom of navigation by Costa Rica for purposes of commerce.

3.10 Nicaragua makes great efforts to deny the relevance of the concept of "freedom of navigation" as discussed by the Permanent Court in the *Oscar Chinn* case, and the treatment of the same concept in the ILA's Helsinki Rules on the Uses of the Waters of International Rivers.[184] This is again a replay of its argument that the only kind of navigation recognised by the Treaty of Limits is navigation "with articles of trade".[185] The definitions of "freedom of navigation" in *Oscar Chinn* and the Helsinki Rules are, according to Nicaragua, "subject to derogation by a *lex specialis*, in this case, the 1858 Treaty".[186] The fact is that instruments and case law describing what is "freedom of navigation" according to general international law can provide a useful tool for the interpretation of the terms "free" and "navigation" used in Article VI.

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[181] NCM, fn 271, referring to NCM, Vol II, Annex 64.

[182] See above, paragraphs 2.67.2.73.

[183] NCM, Vol II, Annex 64.

[184] NCM, paras. 4.1.11, 4.1.15.

[185] "Costa Rica enjoys the rights of 'free navigation' identified, but only as to boats carrying articles of trade": NCM, para. 4.1.12.

[186] NCM, para. 4.1.12.

3.11 Nicaragua accepts that Costa Rica's right of navigation is "unqualified and unconditional" to the full extent of that right as established in Article VI: on its own novel interpretation as navigation with "articles of trade". It is important to emphasise that Nicaragua accepts that Costa Rica has freedom of navigation to the full extent of that right – what it disputes is only the scope of the phrase "*objetos de comercio*".[187]

3.12 Despite this acceptance, Nicaragua's Counter-Memorial requests a declaration by the Court that Costa Rica has to comply with the regulations for navigation, to pay any "special services" provided by Nicaragua on the San Juan and to comply with "all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858."[188] In this instance, Nicaragua does not even make its classical distinction of navigation of vessels carrying "articles of trade" and other kinds of navigation. In Nicaragua's view, all these requirements are compatible with a right of navigation that is "free" and "perpetual". As has been shown and is also developed in Chapter 4, which addresses Nicaragua's breaches, this claim has no foundation.[189]

3.13 On the basis of its sovereignty over the waters of the San Juan, Nicaragua claims that it is permitted to regulate navigation on the River, including Costa Rican navigation in accordance with Article VI of the Treaty of Limits. Nicaragua's Counter-Memorial argues: "Nicaragua must have the power to regulate Costa Rican traffic for the purpose of ensuring that the conditions of the right of navigation laid down in the Treaty are being observed."[190]

3.14 But Nicaragua has no right to interfere with Costa Rica's perpetual right of free navigation and in practice its attempt to impose regulations on Costa Rican navigation amounts to an effective denial of Costa Rica's right. This right as granted is not subject to any other condition than the geographical scope specified in Article VI of the Treaty of Limits, which is not disputed by either party.

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[187] This Reply, paragraphs 2.43-2.56; see also paragraphs 3.39-3.78.

[188] NCM, para. 7.2.6.

[189] This Reply, paragraphs 4.05-4.49.

[190] NCM, para. 2.1.52.

3.15 International practice and case law abundantly demonstrate the impermissibility of derogation of rights stemming from treaties through national legislation. As acknowledged by the Permanent Court, a national regulation which is intended to be applied on an equal basis to all persons concerned cannot derogate from particular rights recognised at the international level to a particular community.[191]

3.16 Even Nicaragua's quotation of the General Claims Commission decision in *James H. McMahon (U.S.A.) v. United Mexican States*, which contains some debatable assertions as to the state of general international law, affirms what Nicaragua seems to deny today:

> "What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty."[192]

3.17 Nicaragua also referred to the Award of the Tribunal of Arbitration in the *Question relating to the North Atlantic Coast Fisheries* of 7 September 1910. However, its reference to this Award is not clear.[193] Again it is worth quoting the relevant paragraph of this arbitral award in its entirety:

> "The exercise of that right by Great Britain is, however, limited by the said Treaty in respect of the said liberties therein granted to the inhabitants of the United States *in that such regulations must be made bona fide and must not be in violation of the said Treaty*. Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, are therefore reasonable and not in violation of the Treaty."[194] (Emphasis added.)

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[191] See *Minority Schools in Albania, Advisory Opinion of 6 April 1935*, PCIJ Reports, Series A/B No. 64, p.3.

[192] NCM, para. 2.1.60.

[193] NCM, para. 2.1.63.

[194] *Award of the Tribunal of Arbitration in Question Relating to the North Atlantic Coast Fisheries*, The Hague, 7 September 1910, 11 UNRIAA 172, 189.

3.18 This Award carefully insists on the need not to violate the rights of private citizens established by the relevant treaty. But there are important differences between the situation dealt with in the 1910 Arbitral Award and the present case. First, in the present case what is at stake is *a right recognised to a State*, since the holder of the perpetual right of free navigation is Costa Rica itself. Second, in the 1910 Arbitral Award the object of the dispute was fisheries, thus it involved a limited resource subject to exhaustion. In the present case, what is at stake is navigation, an activity which is not destructive of any natural resource. No regulation is necessary with regard to Costa Rica's right of free navigation.

3.19 The 1858 Treaty of Limits does not establish any limitations on the exercise of Costa Rica's rights, nor was it stipulated that Nicaragua would exercise jurisdictional powers over Costa Rican navigation. The Cleveland Award confirmed the point that any powers of jurisdiction over Costa Rican navigation would be exercised by Costa Rica, by expressly providing that Article VI of the Treaty of Limits permitted vessels of the revenue service to protect Costa Rica's enjoyment of its right of navigation for purposes of commerce.[195] President Cleveland clearly understood that the object and purpose of the Treaty was that Nicaragua would be entitled to the waters of the River, but Costa Rica would have an autonomous, undisturbed, perpetual right of free navigation on the River, a right that Nicaragua could not interfere with. This view was also endorsed by the 1916 Judgment of the Central American Court of Justice.[196]

3.20 Nicaragua's current position is even more remarkable when it is compared with its own assertions presented to President Cleveland in its pleadings. In particular when referring to Point Eight of Nicaragua's "Points of Doubtful Interpretation", Nicaragua then acknowledged the character and scope of the Costa Rican rights. When Nicaragua presented the reasons why Costa Rica should not be allowed to navigate with vessels of war or the revenue service, it stated that:

> "The navigation of a river *for commercial purposes* does not draw with it the menace that the appearance on its waters of vessels of war must necessarily imply. What need has Costa Rica of war vessels in the light of Article IX of the Treaty? *Even if war*

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[195] CRM, Annexes, Vol 2, Annex 16.

[196] CRM, Annexes, Vol 2, Annex 21; see also below, paragraphs 3.33-3.34.

is flagrant, her commerce on this river could not be interfered with."[197] **(Emphasis added.)**

3.21 Nicaragua further stated:

"It is claimed such navigation is needed to protect commerce. Against whom is such protection needed? *Certainly not against Nicaragua, for that cannot be interfered with, even in case of actual hostilities.*"[198] (Emphasis added.)

3.22 President Cleveland held that while Costa Rica could not navigate the River with war vessels, which it has now not possessed for many decades, it was entitled to navigate with vessels of the revenue service, since it was clear that Costa Rican navigation on the River needed to be supervised; such supervision would be exercised by Costa Rica alone, and not by Nicaragua.

3.23 As is the case with Nicaragua's other arguments in these proceedings, no evidence has been produced by Nicaragua demonstrating how and when, after the 1858 Treaty of Limits came into force, it exercised regulatory powers with respect to Costa Rican navigation. Nicaragua has only relied on the breaches it has committed after the dispute erupted in 1998 to support its arguments; but these breaches bear no relation to the regulatory powers it now argues it possesses.

3.24 Nicaragua argues that it must have the power to regulate Costa Rican traffic in order to ensure that the conditions set forth in the Treaty of Limits are observed.[199] It is curious that this is the first time such an argument has been advanced by Nicaragua.[200] Such regulatory powers sought by Nicaragua do not stem from any of the applicable instruments: not from the Treaty of Limits nor the Cleveland Award and not from the 1916 Judgment of the Central America Court of Justice or the 1956 Agreement.

3.25 Some of the writers cited by Nicaragua in support of its views on the purported right of regulation only address the issue of regulatory rights in

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[197] CRM, Annexes, Vol 6, Annex 208.

[198] *Ibid.*

[199] NCM, para. 2.1.52.

[200] NCM, para. 2.1.53.

relation to innocent passage or innocent use,[201] situations which clearly fall outside a conventional right of free navigation such as that in the present case. But even in the case of an innocent use, the writers generally agree that a State cannot establish regulations that limit navigation.

3.26 Nicaragua cites three types of regulations that it claims would be compatible with the principle of free navigation: (a) the right to monitor the character of the vessel exercising the right of free navigation; (b) the application of regulations for the maintenance of conditions of safe navigation; and (c) the implementation of measures reasonably necessary for the security of Nicaragua and the safety of riparians.[202] In fact the evidence presented by Costa Rica demonstrates that Nicaragua's breaches bear no relation whatever to any regulations of this kind. But in any event, the legal framework governing Costa Rican navigation on the San Juan does not entitle Nicaragua to impose such regulations upon Costa Rica.

3.27 With regard to the safety requirements Costa Rican vessels are apparently obliged to comply with, Nicaragua does not refer to any specific requirements. The affidavits of two Costa Rican boatmen, who until recently navigated the San Juan for decades, reveal that they have never been informed or notified of any such requirements of "safe navigation".[203]

3.28 As to the implementation of measures reasonably necessary for the security of Nicaragua and the safety of riparians, such measures need to be implemented in a way that does not hinder Costa Rica's right of free navigation. As has been stated by Colonel Ricardo Sanchez, Nicaragua has many army posts along the San Juan River, posts fully armed with personnel who are able to safeguard Nicaragua's security.[204] It is not reasonable that such safeguarding is accomplished by forcing all Costa Rican vessels to stop at every military post, to be searched for no apparent reason and to be required to obtain authorisation in advance to navigate, in addition to the payment of the various charges and compliance with other requirements established by Nicaragua.

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[201] See NCM, paras. 2.1.54, 2.1.56.

[202] See NCM, para. 2.1.58.

[203] See Affidavit of Carlos Lao Jarquín, 28 July 2007: CRR Annexes, Vol 2, Annex 51; Affidavit by Jorge Manuel Lao Jarquín, 28 July 2007: CRR Annexes, Vol 2, Annex 52.

[204] NCM, Vol II, Annex 91.

3.29 Furthermore, as recalled by Nicaragua before President Cleveland, Article IX of the Treaty of Limits places a limitation on both countries not to use the River for hostilities against the other. Costa Rica has shown full respect for this obligation. Nicaragua's plea that it must impose security measures on Costa Rica's navigation is a mere pretext.

3.30 It should be noted that Nicaragua does not cite any of its domestic laws which impose requirements on vessels transiting internal waters, nor has it ever officially informed Costa Rica of any such requirements. Furthermore, it acknowledges that such requirements are imposed only on Costa Rican vessels. The affidavit by Colonel Ricardo Sanchez indicates some of the regulations it is said Nicaragua now imposes on Costa Rican vessels.[205] Through this affidavit, Nicaragua accepted that Nicaraguan vessels are free to moor on the Costa Rican banks and carry out their business without any impediments.[206] The rights to land on the bank of the River and for commerce that Costa Rica recognises that Nicaragua holds, in accordance with the 1858 Treaty of Limits, are rights which are reciprocal. While Costa Rica fulfils its obligations under the 1858 and 1956 Treaties, allowing full liberty to Nicaraguan vessels to carry on their commerce on the Costa Rican bank, as is acknowledged by Nicaragua, on the other hand Nicaragua has imposed illegal restrictions on Costa Rica's rights with the purpose of making Costa Rican navigation and the enjoyment of other related rights impracticable.[207]

3.31 By way of these "regulatory powers", Nicaragua seeks to impose its own interpretation, on a case by case basis, of whether a Costa Rican vessel may or may not navigate on the River, a policy that Nicaragua does not even apply to vessels navigating in innocent passage as recognised by international law. This policy results in illegal searches, payment of illegal taxes, the harassment of passengers including children travelling to school, requirements of illegal permits for transit and other restrictions detailed in Costa Rica's Memorial and further in this Reply.

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[205] *Ibid.*

[206] *Ibid.*

[207] Cf. NCM, para. 7.2.5.

3.32 As Costa Rica's rights of navigation are established in categorical terms by treaty, any restrictions placed upon such rights can only be agreed by treaty. In this context it is pertinent to recall a paragraph from the General Claims Commission cited by Nicaragua. The Commission stated:

> "What extension this right of exercise of police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty."[208]

Thus, even in the event of innocent passage, local jurisdiction cannot be exercised in such a way as to render nugatory that innocent passage.

3.33 The 1916 Judgment of the Central American Court of Justice reaffirmed Costa Rican rights and addressed the jurisdictional issue in the following terms:

> "...Costa Rica possesses in the San Juan River, for purposes of commerce, permanent rights of free navigation from its outlet as far up as three miles below Castillo Viejo, and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation is common.
>
> It is clear, therefore, that the ownership which the Republic of Nicaragua exercises in the San Juan River is neither absolute or unlimited; it is necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica – the more so if it is considered that such rights, exercised for revenue and defensive purposes, are, according to the opinion of statesmen, usually confounded in their development with the sovereign powers of the *imperium*; such a concession is equivalent to a real right of use, perpetual and unalterable, that establishes the Republic of Costa Rica in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory.
>
> By virtue of the decisions contained in the Cleveland Award, and what is held therein relating to the territorial boundaries, the following points are evident:
>
> ... The proposition that the rights of navigation on the San Juan River that were confirmed in Costa Rica do not extend to vessels of war, but simply to vessels devoted to revenue and defensive purposes – an interpretation that in no way detracts from the doctrine set forth concerning the practical ownership pertaining in great part to Costa Rica over the San Juan River because navigation with vessels of war, aside

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[208] NCM, para. 2.1.60

from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty."[209]

3.34 The Court went on to state:

> "Costa Rica possesses undisputed title to the right bank of the river, to the land situated within her jurisdictional limits; she has joint ownership in the ports of San Juan del Norte and in Salinas Bay; she possesses the contractual right of perpetual navigation in the river, beginning at a point three miles below Castillo Viejo, accompanied by the full privilege of transit and commerce, and Nicaragua is impressed with the duty not to interfere with navigation, but, on the contrary, to keep the course of the river open; Costa Rica enjoys also the right to moor her vessels on both banks throughout the entire zone in which navigation is common, and the rights involved in guarding and defense 'with all means within her reach.'"[210]

3.35 To summarise, the alleged "regulatory rights" asserted by Nicaragua have no basis in the instruments and seek to interfere with Costa Rica's perpetual right to free navigation, and ultimately to render it nugatory. The instruments cited by Costa Rica, including the 1916 Judgment of the Central American Court of Justice, reaffirm that Costa Rica is not subject to Nicaragua's authorisations, limitations or regulations imposed as a precondition to the exercise of the perpetual right of free navigation. Further, the actions carried out by Nicaragua against Costa Rica's navigation bear no relation to the exercise of any alleged right of regulation.

(3) Costa Rica's right of navigation is not "imperfect"

3.36 Nicaragua gives the impression that Costa Rica's right established in Article VI of the Treaty of Limits is an "imperfect right". It quotes Wheaton's *Elements of International Law*, published just eight years after the conclusion of the 1858 Treaty of Limits. Wheaton wrote that:

> "The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise."[211] (Emphasis added.)

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[209] See CRM, Annexes, Vol 2, Annex 21, pp. 219-220.

[210] CRM, Annexes, Vol 2, Annex 21, p. 222.

[211] Quoted in NCM, para. 2.1.54.

3.37 Nicaragua comments:

> "It is not suggested that this reasoning is directly applicable to the present case, especially in view of the fact that the right of navigation presently in issue arises from a bilateral Treaty. However, the significant point is presented in the final sentence of the passage which clearly assumes that, *when it exists, a right of navigation for commercial purposes is subject to certain conditions as to the mode of its exercise.*"[212] (Emphasis added.)

Nicaragua's embarrassment about this quotation is understandable. Wheaton mentioned the need of a convention to secure the mode of exercise in regards to such "right of navigation for commercial purposes", which is precisely the case of the San Juan River.

3.38 The terminology employed in the Treaty is not that of an "imperfect right". The Treaty does not contain anything granting to Nicaragua any power of limitation or regulation of Costa Rica's right. Nor is Costa Rica's right subject to any limitation, as was the case in other treaties related to freedom of navigation.[213] This is a "perfect" right vested by treaty.

C. "*Con objetos de comercio*"

3.39 In its Counter-Memorial, Nicaragua claims that:

> "...in some cases, these documents filed by Costa Rica are accompanied by inaccurate translations of the text or certain parts of the text that had previously not been disputed and hence little interest was placed on its correct translation.... The most salient of these inaccuracies of translation is that of the phrase used to describe the type of navigation rights granted to Costa Rica in the San Juan River. Thus the phrase 'con objetos de comercio' contained in the Treaty of Limits of 1858 is loosely translated as 'with purposes of commerce' and not its accurate meaning of 'with objects of commerce' or 'with articles of trade.'"[214]

3.40 This same argument, i.e. that "*con objetos de comercio*" should be correctly understood as "with articles of trade", is repeated again and again throughout Nicaragua's Counter-Memorial in an attempt to exclude the transportation of passengers and to justify the unlawful restrictions on Costa Rican navigation implemented by Nicaragua.

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[212] NCM, para. 2.1.55.

[213] See CRM, para. 4.09.

[214] NCM, Introduction, para. 20. As to Nicaragua's unsubstantiated assertion that Costa Rica has presented inaccurate translations, see above, paragraph 1.14.

(1) "*Con objetos de comercio*" means "for purposes of commerce"

3.41 Nicaragua's argument not only contradicts the natural interpretation of the text but it is also contrary to its own translation and its previous public position for almost 150 years. The English version of the 1858 Treaty of Limits presented by Nicaragua to President Cleveland in 1887 translated "*con objetos de comercio*" as "for the purposes of commerce". Nicaragua's English version of Article VI of the 1858 Treaty of Limits states:

> "…but the Republic of Costa Rica shall have perpetual rights, in the said waters, of free navigation from the river's mouth to three English miles below Castillo Viejo *for the purposes of commerce*, whether with Nicaragua or the interior of Costa Rica, by way of the rivers San Cárlos or Sarapiqui or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic."[215] (Emphasis added.)

3.42 This English version of Article VI of the 1858 Treaty of Limits is very similar to the English version presented by Costa Rica:

> "…but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being *for the purposes of commerce* either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica."[216] (Emphasis added.)

3.43 Not only did Nicaragua translate "*con objetos de comercio*" as "for the purposes of commerce" in the English version of the 1858 Treaty of Limits it presented to President Cleveland, but Nicaragua *only* submitted English versions of its documents to Cleveland. In a Note dated 31 October 1887 addressed to Nicaragua's Minister Horacio Guzmán, the US Secretary of State T.F. Bayard acknowledged receipt of Nicaragua's arguments and documents and inquired if these were to be considered as originals. Bayard's note was in the following terms:

> "I have the honor to acknowledge the receipt of the original and duplicate copies of the case of the Republic of Nicaragua under the Arbitration Treaty of December 24, 1886, which were left by you at this Department on the 27th instant, unaccompanied by any formal note of transmission.… As the case of Nicaragua is presented in the English language, I have the honor to inquire whether, in that form, it is regarded by your Government as the original, or whether it is intended to be accompanied by a Spanish

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[215] CRM, Annexes, Vol 2, Annex 7(c).

[216] CRM, Annexes, Vol 2, Annex 7(b).

original and to be regarded as a translation and of collateral force and effect therewith. In the latter alternative, it would be requisite for you to admit the correctness and authenticity of the English text, upon which the arbitrator must necessarily depend for his understanding of the issues before him."[217]

3.44 Minister Guzmán responded by Note of 1 November 1887, stating:

> "I have the honor to acknowledge the receipt of your communication of the 31st ultimo, acknowledging, on behalf of the President, the receipt of the original and duplicate copies of the Case of the Republic of Nicaragua, and inquiring, as it is presented in the English language, whether in the form it is regarded by my Government as the original, or whether it is intended to be accompanied by a Spanish original and to be regarded as a translation and of collateral force and effect therewith.
>
> I have the honor to reply that the copy marked 'original' was intended to be and is the original copy of the presentation of the Case of Nicaragua, and the English language was adopted as being the language of the Arbitrator, the purpose being to relieve the Arbitrator from the responsibility of a translation from the Spanish to the English language; and, therefore, all papers and communications relating to this Case, that it may be necessary for me to present for the consideration and use of the Arbitrator, will be in the English language."[218]

3.45 It is clear then Nicaragua had always understood that the term "*con objetos de comercio*" in the 1858 Treaty of Limits meant "for purposes of commerce".

3.46 The fact that Costa Rica's navigation on the San Juan River was "for the purposes of commerce" was also quite clear to the Assistant Secretary of State, George L. Rives, to whom President Cleveland delegated the task of studying the pleadings of Costa Rica and Nicaragua and of preparing the draft Award. In the first part of his Report Rives stated as follows:

> "The Treaty further provides that…Nicaragua shall have, exclusively, dominion and supreme control of the waters of the San Juan, --Costa Rica having the right of free navigation *for the purposes of commerce* in that part of the River on which she is bounded."[219] (Emphasis added.)

3.47 In the second part of Rives' Report the same understanding of the true extent of Costa Rica's commercial navigational rights was clearly stated:

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[217] Secretary of State of the United States, T.F. Bayard, to Nicaraguan Envoy Extraordinary and Minister Plenipotentiary, Horacio Guzmán, 31 October 1887: CRR, Annexes, Vol 2, Annex 29.

[218] Nicaraguan Envoy Extraordinary and Minister Plenipotentiary, Horacio Guzmán, to Secretary of State of the United States, T.F. Bayard, 1 November 1887: CRR, Annexes, Vol 2, Annex 30.

[219] NCM, Vol II, Annex 70. This Report is also quoted in NCM, para. 2.1.22.

> "Leaving out of sight, for the present, the fact that Costa Rica owns one bank of the San Juan, and regarding it solely as a Nicaraguan river, we may first enquire whether the right of *free commercial navigation* granted to Costa Rica necessarily involves the right of navigation by her vessels of war."[220] (Emphasis added.)

3.48 Other extracts from Rives' Report reinforce the correct understanding of Costa Rica's navigational rights:

> "4. Nicaragua consented, by Article IV, that the Bay of San Juan, which always belonged to her and over which she exercised exclusive jurisdiction, should be common to both Republics; and by Article VI she consented also that Costa Rica should have, in the waters of the River, from its mouth on the Atlantic up to three English miles before reaching Castillo Viejo, the *perpetual right of free navigation for purposes of commerce*. Is Costa Rica bound to concur with Nicaragua in the expense necessary to prevent the Bay from being obstructed, to keep the navigation of the River and por free and unembarrassed, and to improve it for the common benefit?"[221]

The Report continues:

> "The River lies wholly within the borders of Nicaragua. Costa Rica, possessing one bank for a portion of its course, has only what may be described as an easement or servitude in its waters. Under the Treaty, she has *the right of navigation for purposes of commerce*, and, by implication, such other ordinary riparian rights as may be enjoyed without affecting the sovereign rights of Nicaragua."[222] (Emphasis added.)

3.49 In the first paragraph quoted above, Rives transcribed the English version submitted by Nicaragua of "Point 4 of Doubtful Interpretation" which it had presented to Costa Rica and which constituted the basis for Cleveland's Award.[223] Nicaragua itself referred once again to Costa Rica's "perpetual right of free navigation for purposes of commerce".

3.50 In the second paragraph quoted above, Rives proceeded to analyse in his own words the situation as he understood it. Rives clearly referred once again to Costa Rica's "right of navigation for purposes of commerce". Furthermore, Rives referred to Costa Rica's "easement or servitude" in the waters of the San Juan River to describe the legal status of Costa Rica's perpetual right of free commercial navigation on the San Juan River. Indeed, Costa Rica's right of free navigation for purposes of commerce does in fact constitute a limitation to Nicaragua's sovereignty over the San Juan akin to that of a perpetual "servitude" in domestic law.

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[220] NCM, Original Documents deposited within the Registry, Part III, Annex 71, pp. 212-213.

[221] NCM, Original Documents deposited within the Registry, Part III, Annex 71, p. 231.

[222] NCM, Original Documents deposited within the Registry, Part III, Annex 71, p. 233.

[223] The English version of this Note from Fernando Guzmán to Costa Rica's Foreign Minister dated 22 June 1887 was presented by Costa Rica: CRM, Annexes, Vol 3, Annex 36.

3.51 Nicaragua always understood that the term "*con objetos de comercio*" meant "for purposes of commerce". It should also be remembered that the 1858 Treaty of Limits uses the term "*objetos*" as purposes not only in its Article VI, which establishes Costa Rica's navigational rights, but also in Article VIII:

> "Si los contratos de canalizacion ó de tránsito celebrados antes de tener el Gobierno de Nicaragua conocimiento de este convenio, llegasen á quedar insubsistentes por cualquier causa, Nicaragua se compromete á no concluir otro sobre los expresados *objetos*…."[224] (Emphasis added.)

3.52 Costa Rica's English version of Article VIII of the 1858 Treaty of Limits presented to Cleveland is as follows:

> "If the contracts of canalization or for transit entered into by the Government of Nicaragua previous to its being informed of the conclusion of this treaty should happen to be invalidated for any reason whatever, Nicaragua binds herself not to enter into any other arrangement for the aforesaid *purposes*…"[225] (Emphasis added.)

3.53 Nicaragua's English version of the same Article submitted to Cleveland reads as follows:

> "If the contracts for a canal or a transit made before Nicaragua's knowledge of this agreement should become incapable of duration through whatever cause, Nicaragua binds herself not to conclude any other for the said *objects*…"[226] (Emphasis added.)

3.54 Clearly "objects" is used by Nicaragua as meaning "purposes," not "articles". This contradicts Nicaragua's present interpretation as developed in its Counter-Memorial:

> "If the term *objeto* is appropriate for referring to a matter, good or thing, and also to a purpose or aim, the same cannot be said of the plural form of the word, namely: *objetos*. Although the Royal Spanish Academy Dictionary does not offer a direct and express definition of this usage, it is entirely beyond the normal and usual use of the Spanish language to speak of the *objetos* of a treaty or science when referring to its purposes, aims or objectives. On the other hand, the term objetos is used to identify

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[224] CRM, Annexes, Vol 2, Annex 7.

[225] CRM, Annexes, Vol 2, Annex 7(b).

[226] CRM, Annexes, Vol 2, Annex 7(c).

things, goods, merchandise and matters dealt with by a science or treaties, if used in the plural."[227]

In other words, Nicaragua is claiming today that any time the word "*objetos*" appears in the plural it should always be interpreted as meaning "things" and never as "purposes", whereas in its official translation of the 1858 Treaty of Limits it interpreted "*objetos*" exactly in that manner – and correctly so.[228]

3.55 The fallacy of Nicaragua's arguments can be demonstrated by reference to instruments contemporary to the 1858 Treaty of Limits. For example, the Treaty of Friendship, Commerce and Navigation between United States and Nicaragua (Cass-Irisarri) of 16 November 1857, presented by Nicaragua in its Counter-Memorial, states in its Article II:

> "Habrá recíproca libertad de comercio entre todos los territorios de la República de Nicaragua, y los territorios de los Estados Unidos. Los ciudadanos de los dos países, respectivamente, tendrán plena libertad de llegar franca y seguramente, con sus buques y cargamentos, á todos los lugares, puertos y ríos en los territorios mencionados, á los cuales se permita, ó se permitiere llegar á otros extranjeros, entrar en los mismos, y permanecer y residir en cualquiera parte de ellos, respectivamente, así como alquilar y ocupar casas y almacenes *para objetos de comercio*; en general, los comerciantes y traficantes de cada nación, respectivamente, gozarán de la más completa protección y seguridad para su comercio, sujetos siempre á las leyes y estatutos de los dos países respectivamente…"[229] (Emphasis added.)

In this unratified Treaty the phrase "*objetos de comercio*" was presented in the plural, in a similar manner as the 1858 Treaty of Limits. Since both Spanish and English were the authentic languages of the 1857 Treaty, the English version is of interest. The official English version of this Article of the Cass-Irisarri Treaty reads as follows:

> "There shall be, between all the territories of the United States and the territories of the Republic of Nicaragua, a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have full liberty, freely and securely, to come, with their ships and cargoes, to all places, ports, and rivers, in the territories aforesaid, to which other foreigners are, or may be, permitted to come, to enter into the same, and to remain and reside in any part thereof, respectively; also, to hire and occupy houses and warehouses *for the purpose of their commerce*; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and

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[227] NCM, para. 4.1.27.

[228] See above, paragraphs 1.09-1.12.

[229] NCM, Vol II, Annex 5.

> security for their commerce, subject always to the laws and statutes of the two countries respectively..."[230] (Emphasis added.)

3.56 Thus for both the United States and Nicaragua the term "*con objetos de comercio*" was understood as meaning "for the purpose of their commerce". Surprisingly, instead of presenting the original authentic English version of the Cass-Irisarri Treaty, Nicaragua produced its own translation which simply refers to "...houses and warehouses for commerce", expediently modifying the official English wording of "...houses and warehouses for *the purpose of their* commerce".[231] Nicaragua preferred to "summarise" this phrase instead of engaging in a translation of "*para objetos de comercio*". This is effectively an unannounced alteration of a document.

3.57 The United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Lamar-Zeledón) was signed on 16 March 1859 and replaced the Cass-Irisarri Treaty. Using similar wording to the Cass-Irisarri Treaty, the 1859 Lamar-Zeledón Treaty provided in its Article II of the original authentic Spanish version:

> "Habrá recíproca libertad de comercio entre todos los territorios de la República de Nicaragua y los territorios de los Estados Unidos. Los ciudadanos de los dos países, respectivamente, tendrán plena libertad de llegar franca y seguramente, con sus buques y cargamentos á todos los lugares, puertos y ríos en los territories mencionados, á los cuales se permita, ó se permitiere llegar á otros extranjeros; de entrar en los mismos, y permanecer y residir en cualquier parte de ellos, respectivamente; así como alquilar y ocupar casas y almacenes *para los objetos de su comercio*; y en general los comerciantes y traficantes de cada Nación, respectivamente, gozarán de la más completa protección y seguridad para su comercio, sujetos siempre á las leyes y estatutos de los dos países respectivamente..."[232] (Emphasis added.)

3.58 The original authentic English version of this Article reads as follows:

> "There shall be between all the territories of the United States and the territories of the Republic of Nicaragua a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have full liberty freely and securely to come with their ships and cargoes to all places, ports, and rivers in the territories aforesaid to which other foreigners are or may be permitted to come, to enter into the same, and to remain and reside in any part thereof, respectively; also to hire and occupy houses and warehouses *for the purposes of their commerce*; and generally the merchants and

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[230] CRR, Annexes, Vol 2, Annex 10.

[231] NCM, Vol II, Annex 5.

[232] CRR, Annexes, Vol 2, Annex 13.

traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, subject always to the laws and statutes of the two countries respectively…"[233] (Emphasis added.)

3.59 As can be seen, the wording of the Lamar-Zeledón Treaty is practically the same as that of the Cass-Irisarri Treaty. In the authentic English version the phrase "*para los objetos de comercio*" was expressed as "for the purposes of their commerce". Nicaragua argues that "*objetos*" in the plural was not rendered as "purposes"; but the fact is that in the wording of other treaties contemporary to the 1858 Treaty of Limits it was a common practice – indeed, a Nicaraguan practice – to employ the word "*objetos*" as meaning "purposes", both in the singular as well as in the plural. These contemporary treaties deal with matters closely related to Costa Rica's right of navigation as established by the Treaty of Limits.

3.60 **Table 1**, appended to this Chapter, provides an impressive number of relevant treaties, contracts and other instruments contemporary with the Treaty of Limits in which the term "*objetos*" was overwhelmingly used as meaning "purposes". **Table 2**, also appended, shows how contemporary treaties, contracts and other instruments refer to goods, merchandise or commodities. Taken together the Tables show that Nicaragua's novel interpretation of "*objetos de comercio*" as meaning "articles of trade" is devoid of any justification.[234]

3.61 Further, it is so clear that "*objetos de comercio*" means "purposes of commerce" that on different occasions Nicaragua stated it this way in its own Counter-Memorial, thereby contradicting the most important argument presented by it. For example, Nicaragua wrote:

> "There is a further important consideration arising from the fact that Article VI does not provide for 'free navigation' *tout court*, but only 'for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos River, the Sarapiquí, or any other way, proceeding from the bank of the San Juan River'. Thus the right of free navigation is articulated in the form of *a careful statement of purposes*. Indeed, the content of the Cleveland Award of 1888, in its second finding, underlines *the special purpose* of the right of navigation recognized in Article VI."[235] (Emphasis added.)

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[233] CRR, Annexes, Vol 2, Annex 13.

[234] See below, paragraph 3.71 for further discussion of the Tables.

[235] NCM, para. 2.1.51.

Not only did Nicaragua correctly translate "*objetos de comercio*" as "purposes of commerce", but it clearly and expressly acknowledged that Costa Rica's "right of free navigation is articulated in the form of a careful statement of purposes".[236] These purposes are no other than "commercial" and "fiscal," as Nicaragua described them in two official reports signed by its Minister of Foreign Affairs and published in 1954 and 1974 under the title "*Situación jurídica del Río San Juan*".[237]

3.62 Elsewhere in its Counter-Memorial, Nicaragua writes:

> "In the present case, in the absence of a median line boundary, it is clear that Costa Rica cannot be accorded a general police power over the Rio San Juan. In the Award of President Cleveland, as Arbitrator, the question of the right of navigation of vessels of war was resolved not by recourse to a generalized 'right of free navigation' but to the conditions of navigation specified in the Treaty: that is to say the right of 'free navigation… *for the purposes of commerce.*' (Article VI)…"[238] (Emphasis added.)

3.63 At least Nicaragua is consistent in its practice of "improving" the original wording and meaning of Spanish documents and of "correcting" documents submitted to the Court by Costa Rica. Its distortions are not accidental. Another example is the quotation of the Carazo-Soto Treaty signed by Costa Rica and Nicaragua on 26 July 1887. Nicaragua wrote the following:

> "Article 6.3 of this agreement provided that '[t]he right granted to Costa Rica to navigate *with articles of trade* on the San Juan River, from its mouth up to 3 English miles below Castillo Viejo, does not comprise the right to navigate with vessels of war or vessels of the revenue service exercising jurisdiction'."[239] (Emphasis added.)

The passage quoted is referenced to "CRM, Vol 2, Annex 15, Carazo-Soto Treaty". Thus Nicaragua represents that the English version Costa Rica submitted to the Court used the term "with articles of trade". In fact the English version submitted by Costa Rica reads as follows:

> "3° The right, granted to Costa Rica, of navigation *for purposes of commerce [objetos de comercio]* in the San Juan River, from its mouth to three English miles before Castillo Viejo, does not include navigation with war or fiscal vessels exercising jurisdiction."[240] (Emphasis added.)

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[236] NCM, para. 2.1.51.

[237] CRM, Annexes, Vol 6, Annexes 219 and 222.

[238] NCM, para. 2.1.62.

[239] NCM, para. 3.1.43.

[240] CRM, Annexes, Vol 2, Annex 15.

3.64 As if these instances were not enough, Nicaragua alters the wording of yet another significant document. Its Counter-Memorial states:

> "The language in paragraph *Second* of the Cleveland Award is especially worthy of close attention since the arbitrator substituted it entirely for the proposal made by George Rives for that part of the Award. For President Cleveland, the only navigation by Costa Rican vessels of the revenue service that was permitted by the treaty was that which is 'related to and connected with' the right to navigate with *articles of trade*. As if to avoid any possible misunderstanding, the arbitrator requires that navigation with revenue vessels be both (a) 'related to' *and* (b) 'connected with' navigation with *articles of trade*. He thus underscores the inextricable connection between public revenue vessels and private boats carrying *articles of trade*: the two go together, but only if the former are 'related to and connected with' the latter."[241] (Emphasis added.)

In the paragraph transcribed above, Nicaragua modified the original English wording of the 1888 Cleveland Award, which reads as follows:

> "The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the *'purposes of commerce'* accorded to her in said article, or as may be necessary to the protection of said enjoyment."[242] (Emphasis added.)

The Cleveland Award unmistakably uses the correct phrase "purposes of commerce". In fact, Nicaragua stopped the quotation of this Article of the Cleveland Award just before the reference to the purposes of commerce, in order to replace it by "articles of trade". This is disingenuous.

3.65 Nicaragua argues that the meaning of navigation "*con objetos de comercio*" was not submitted to President Cleveland as one of the matters of "dubious interpretation" of the Treaty of Limits and hence was not addressed in his Award.[243] This is true. The reason is that both parties agreed on the content of the phrase, as shown by their identical translations. Nicaragua only began to advance a narrower meaning – "with articles of trade" – a century later.

3.66 Both parties and the Arbitrator, while dealing with Article VI of the Treaty of Limits, treated the expression "*con objetos de comercio*" as meaning

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[241] NCM, para. 3.1.54.

[242] CRM, Annexes, Vol 2, Annex 16.

[243] NCM, para. 3.1.1.

"for the purposes of commerce".[244] The way Nicaragua presents the situation deserves to be recalled in full:

> "Thus the Cleveland Award sheds no direct light on the meaning of the phrase, '*con objetos de comercio*'. Indeed, if the content and scope of Costa Rica's right to navigate '*con objetos de comercio*' had been at issue, it seems certain that the parties would have paid more attention to the translation of the original Spanish words in their pleadings, as would President Cleveland in his Award. Yet from all that appears, they paid no attention at all to this phrase. Indeed, the translations of the 1858 Treaty prepared by both parties for the Cleveland Arbitration were identical on this point ('for the purposes of commerce'). President Cleveland, for his part, was careful not to prejudice in any way the meaning of the Spanish text, as shown by his enclosing the English translation of the phrase in quotation marks in the *Second* paragraph of his Award. It is thus the 1858 Treaty, not the Cleveland Award, that is controlling on the question of the nature and scope of Costa Rica's right to navigate in Nicaraguan territory, on the San Juan River, '*con objetos de comercio*."[245] (Emphasis added; references omitted.)

3.67 Nicaragua acknowledges that it raised all the "points of dubious interpretation" to be clarified by the Arbitrator and that it did not raise the issue that forms one of the questions of the present dispute before the Court. Nicaragua also recognises its own translation of "*con objetos de comercio*" in Article VI was unambiguous: "for the purposes of commerce".[246] It is not possible to claim that Nicaragua considered that "with the purposes of commerce" meant "with articles of trade".

3.68 Nicaragua suggests that President Cleveland enclosed the expression "for purposes of commerce" in inverted commas in order not to prejudice the meaning of the phrase.[247] This imaginative essay is not substantiated by any evidence. President Cleveland used the inverted commas simply because he was quoting the words of Article VI, as translated by the parties.

3.69 Nicaragua also claims that the fact that Rives did not put the Spanish text after "for the purposes of commerce" in his Report is of significance. Nicaragua concludes that "Mr. Rives did not believe that this phrase was in any way germane to the dispute before the arbitrator."[248] It is true that the meaning of "*con objetos de comercio*" was not in dispute. But this does not help Nicaragua. If its present interpretation had been conceived of at the time, either by itself or by Rives, this would have carried decisive weight in favour of excluding Costa Rican navigation with vessels of war or with armed vessels of its Revenue Service.

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[244] CRM, para. 4.22.

[245] NCM, para. 3.1.7.

[246] CRM, Annexes, Vol 2, Annex 7(c).

[247] Also in NCM, para. 3.1.24.

[248] NCM, para. 3.1.26.

3.70 Until the present dispute broke out, Nicaragua had consistently accepted that "*con objetos de comercio*" means "for purposes of commerce". In its Memorial Costa Rica presented copies of three important official statements by Nicaragua to show this:

(i) A letter dated 27 July 1897 from the Secretary to the Diet of the Mayor Republic of Central America, of which Nicaragua was part, to the Minister of Foreign Affairs of Costa Rica, in which it is stated that:

> "Costa Rica [tiene] únicamente el derecho de libre navegación para *fines de comercio* desde su desembocadura en el Atlántico hasta tres millas inglesas antes de llegar al *Castillo Viejo*."
>
> Translation by Costa Rica: "Costa Rica only has the right to free navigation *for purposes of commerce [para fines de comercio]* from the mouth in the Atlantic up to three English miles before reaching Castillo Viejo."[249] (Emphasis added.)

(ii) An official publication of the Ministry of Foreign Affairs of Nicaragua of 1954 under the signature of the Minister of Foreign Affairs, Oscar Sevilla Sacasa, which stated that:

> "Costa Rica, solo tiene derecho de navegación, exclusivamente *con fines de comercio y fiscales*, en la parte del río comprendida entre la desembocadura en el Atlántico y punto situado tres millas inglesas antes de llegar al Castillo Viejo."
>
> Translation by Costa Rica: "Costa Rica only has the right of navigation, exclusively, *for commercial and fiscal purposes [con fines de comercio y fiscales]*, at the part of the river between the mouth of the Atlantic up to within three English miles of Castillo Viejo."[250] (Emphasis added.)

(iii) Another official publication of the Ministry of Foreign Affairs of Nicaragua under the signature of the Minister of Foreign Affairs presented in 1974, which repeated the same text as the 1954 edition, qualifying the navigational rights of Costa Rica as being "for commercial and fiscal purposes".[251]

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[249] CRM, Annexes, Vol 3, Annex 37.

[250] República de Nicaragua, Ministerio de Relaciones Exteriores, *Situación Jurídica del Río San Juan* (Managua, 1954): CRM, Annexes, Vol 6, Annex 219.

Nicaragua does not respond to any of these documents.

3.71 Finally, it should be noted that whenever the intention was to refer to merchandise or "articles of trade", the term "*objetos*" was not often used. Table 2 appended to this Chapter demonstrates that in an overwhelming number of cases, terms such as "*artículos*", "*mercancías*", "*productos*", "*cosas*", "*efectos*" and "*bienes*" were used to refer to "articles", "merchandise", "products" etc. In the exceptional case where "*objetos*" is used to mean "objects" or "things", it is quite clear from the context that the word has that meaning. For example, in item 2 of Table 2 (a canal contract), the term "*objetos*" is used to refer to "objects" in the following context:

"…para el establecimiento ó la erección de casas, almacenes, diques, nuelles, estaciones, ó cualesquiera otros objetos útiles que tengan relación con las obras del canal."

This is translated as:

"…for establishing or building houses, warehouses, dikes, docks, stations or any other useful objects that may have relation with the canal works."[252]

Another example is the use of "objetos" in an extradition treaty to mean "objects":

"Cuando haya lugar á la extradición, todos los objetos aprehendidos, que tengan relación con el delito…"

translated as:

"When the extradition proceeds, all objects seized that have any relation to the crime…"[253]

3.72 Another element of the internal context of the 1858 Treaty of Limits which is relevant to the interpretation of "*con objetos de comercio*" is found in the same Article VI. The fact that this Article refers a few words later to the area as being that "where the navigation is common" is also significant. The adjective employed to qualify both Nicaraguan and Costa Rican navigation is "common". This is not a wording that corresponds to a navigation which, for Costa Rican vessels, is limited to merchandise ("articles of trade"). The wording suggests that navigation by both countries is similar in scope.

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[251] República de Nicaragua, Ministerio de Relaciones Exteriores, *Situación Jurídica del Río San Juan* (Managua, 1974): CRM, Annexes, Vol 6, Annex 222.

[252] See item 2 of Table 2, below. This is similar to the uses of "*objetos*" in items 13 and 17 of Table 2.

[253] See item 21 of Table 2, below; and see item 22 for a similar use of "*objetos*".

3.73 To summarise, despite the extraordinary efforts of Nicaragua to create confusion, the inescapable conclusion is that this phrase was always understood to mean "for purposes of commerce".

(2) The scope of the term "*comercio*" in the Treaty of Limits

3.74 In its Counter-Memorial, Nicaragua focuses exclusively in the term "*objetos*". It is just *en passant* that Nicaragua contends that:

> "the reference to *commerce* in Article VI of the Jerez-Cañas Treaty comprised in 1858, and still comprises today, traffic in commodities and not services unrelated to said traffic. This is particularly the case when the words 'with articles of' are added to 'commerce.'"[254]

Nicaragua seems to agree with Costa Rica that the term "commerce" encompasses more than merely "trade", but Nicaragua does not attempt either to justify its assertion that "commerce" is limited to "traffic in commodities" nor to rebut the meaning of the word "commerce" as encompassing transportation of persons and goods as well as communication.[255]

3.75 Without any explanation, Nicaragua's Counter-Memorial states that if the parties would have wished to establish a broad right of navigation "for purposes of commerce", they would have used the phrase "*sous le rapport de commerce*" employed in the Congress of Vienna.[256] This is disingenuous. "*Con objetos de comercio*" is an equivalent form in Spanish of the quoted phrase in French, as explained in Costa Rica's Memorial.[257]

(3) Navigation "*con objetos de comercio*" includes transport of persons

3.76 In its effort to deprive the notion of "freedom of navigation" described by the Permanent Court in the *Oscar Chinn* case of any relevance to the present dispute, Nicaragua contends that the Treaty of Limits excluded the transport of passengers:

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[254] NCM, para. 4.3.19.

[255] CRM, paras. 4.42-4.72.

[256] NCM, para. 4.1.29.

[257] CRM, para. 4.43.

> "Further evidence of the latter is the Permanent Court's inclusion in its broad definition of 'freedom of navigation' the freedom 'to transport… passengers' – something that would never have been agreed to by a Nicaraguan Government well aware that the most lucrative use of the River for Nicaragua was the transport of passengers, as attested by the contracts for this purpose detailed in Chapter 1, Section 3 above, and ever mindful of the need to have exclusive authority over the transport of passengers on the San Juan in order to conclude agreements relating to the prospective inter-oceanic route."[258]

Nicaragua's argument that the transport of passengers was "carefully excluded from the right of navigation with articles of trade recognised by Article VI of the Jerez-Cañas Treaty" does not resist serious analysis. If the intention of the parties had been to exclude the transport of passengers, they would certainly have used express language to achieve that result – and not a phrase such as "*con objetos de comercio*", which is a positive , not a negative, phrase, containing words of extension not limitation. The normal way to "carefully exclude" transport of passengers would have been to state exactly this: "with the exception of transport of passengers" or to precisely identify which of the purposes of commerce were allowed, to the exclusion of the other. Another way would have been to exclude a particular method or mode of transport, as in the unratified Marcoleta-Molina Treaty of 1854, which expressly excluded navigation by steamboat.[259] There is nothing in the record that supports the notion that this was the intention of the parties, or even that of the Nicaraguan negotiator. Nicaragua's assertion is not sustained by any evidence.[260]

3.77 The argument advanced by Nicaragua is that transport of passengers was "by far" "[t]he most lucrative business at the time of the signing of the Treaty of 1858",[261] that Nicaragua had the right to grant concessions for the transit and the construction of a canal and that it did so, in a way that was recognised by Costa Rica in Articles VII and VIII of the Treaty of Limits.[262] But none of these assertions show that Costa Rica's right of free navigation – which normally includes transport of persons and goods – was limited so as to exclude transport of persons. Nicaragua itself was careful not to appear to deny Costa Rica's right to transport "persons and property" in the treaties it concluded with the countries to whose companies it granted or envisaged granting concessions – the United States in 1857, France in 1859 and Great Britain in 1860.[263]

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[258] NCM, para. 4.1.11.

[259] NCM, Vol II, Annex 4.

[260] See NCM, para. 4.1.37.

[261] NCM, para. 4.1.37

[262] NCM, para. 4.1.38.

3.78 Furthermore all the examples of concessions mentioned by Nicaragua concerned *inter-oceanic* transit of passengers as well as "articles of trade" in general.[264] Obviously, this inter-oceanic transit bears no relation to Costa Rica's right of free navigation as established by Article VI of the Treaty of Limits. Hence, Nicaragua's suggestion of the "careful exclusion" of the right to transport passengers in Article VI of the 1858 Treaty of Limits is without any basis.

D. Public Rights of Protection, Custody and Defence

(1) Applicable Law

3.79 Costa Rica's public rights of protection, custody and defence are established in Article IV of the Treaty of Limits. These rights have implications for Costa Rica's navigation on the San Juan. Moreover, Article VI establishes a perpetual right of free navigation for Costa Rica, which of course includes navigation with public vessels. This was recognised by the Second Article of the Cleveland Award, which provides:

> "The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[265]

3.80 In its decision of 30 September 1916, the Central American Court of Justice found that:

> "Costa Rica, for example, cannot ply that stream with war vessels as, of course, Nicaragua can do; but, on the other hand, those rights are greater than those of a mere co-owner (*copropietario*) because the Costa Rica vessels, as well merchantmen as revenue cutters, in the zone in which navigation is common, have a free course over the

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[263] CRR, Annexes, Annexes 10, 14 and 15. See discussion in this Reply, paragraph 2.52 above.

[264] NCM, paras. 4.1.42-4.1.45.

[265] CRM, Annexes, Vol 2, Annex 16.

whole river, throughout its length and breadth, and free access, exempt from imposts, to any point on the Nicaraguan shore."[266]

3.81 Other relevant conventional rules are Articles 1 and 2 of the Fournier-Sevilla Agreement of 9 January 1956,[267] which is based on Article IV of the Pact of Amity of 21 February 1949 (Sevilla-Esquivel),[268] the Cuadra-Castro Communiqué of 8 September 1995[269] and the Cuadra-Lizano Joint Communiqué of 30 July 1998, which provides for navigation by Costa Rican public vessels subject to notice and conditions: Costa Rican agents may only carry their normal arms, and the Nicaraguan authorities may accompany these vessels which, during their journey, must report to the Nicaraguan border posts.[270]

(2) Nicaragua's position

3.82 According to Nicaragua, the duty (and right) to contribute to the *safeguarding* (*guarda*) of the San Juan River, stipulated in Article IV of the 1858 Treaty, can only be exercised by Costa Rica from its shores. It relies on the manner in which G.L. Rives prepared the draft of the Cleveland Award. According to Rives, the expression "within their reach" had to be interpreted in its geographical sense (which would have limited Costa Rica's duties).[271] Nicaragua further argues that when he amended Rives's draft award, President Cleveland limited Costa Rica's right of navigation with public vessels to navigation connected to purposes of commerce.[272]

3.83 Nicaragua points out that Costa Rica also bases its right to *re-supply* its border posts on its shore via the San Juan River on the duty (and right) laid down in Article IV of the 1858 Treaty. For Nicaragua, the performance of that duty cannot, however, go beyond the River's right bank because the Cleveland Award did not recognise a Costa Rican right to sail warships in the sector of common navigation of the San Juan, and because Nicaragua has sovereignty over the waters of the River.[273]

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[266] CRM, Annexes, Vol 2, Annex 21.

[267] CRM, Annexes, Vol 2, Annex 24.

[268] CRM, Annexes, Vol 2, Annex 23.

[269] CRM, Annexes, Vol 2, Annex 27.

[270] CRM, Annexes, Vol 2, Annex 28. See, in particular, points 3(1) and 3(2).

[271] NCM, para. 4.2.31.

[272] NCM, para. 4.2.15.

3.84 Nicaragua stresses that even according to the Cuadra-Lizano Joint Communiqué, the right claimed by Costa Rica was conditional.[274] Moreover, when in June and August 2000 the two Presidents exchanged views about a possible revival of the Joint Communiqué, the President of Costa Rica referred to the latter as establishing a *modus operandi* rather than a "right" or recognition of a "general practice".[275] This shows, according to Nicaragua, that there was neither binding practice nor established custom, but only "pure tolerance".[276] In the presidential correspondence of 2000, Nicaragua advocated a mechanism of authorisation whereas Costa Rica proposed a system of notification – both positions showing that no right existed.[277]

3.85 Moreover, according to Nicaragua, there is no need to use the river for resupply of border posts: Costa Rica disposes of the necessary infrastructure and means (roads, tracks, airstrips, helicopters) to do so without using the River.[278] Nicaragua notes that Costa Rica seems to have succeeded in re-supplying its border posts until the end of the three-year moratorium established in Point 3 of the Alajuela Declaration of 26 September 2002.[279] During that time, Costa Rica abstained from raising the re-supply issue, which shows: (i) that Costa Rica itself is not convinced of the existence of a right to re-supply; and (ii) that there were other ways of re-supplying the border posts.[280] The mere fact that resupply may have become more onerous is irrelevant.[281]

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[273] NCM, para. 5.2.2.

[274] NCM, para. 5.2.4.

[275] NCM, para. 5.2.6.

[276] NCM, para. 5.2.7.

[277] NCM, para. 5.2.8.

[278] NCM, para. 5.2.9.

[279] CRM, Annexes, Vol 2, Annex 29.

[280] CRM, para. 5.2.10.

[281] CRM, para. 5.2.12.

(3) Costa Rica's position

3.86 As explained in Costa Rica' Memorial,[282] four reasons militate in favour of a right of navigation on the San Juan by Costa Rican public vessels carrying police with normal arms. The first is that the re-supply of posts is covered by the right of free navigation for purposes of commerce in Article VI of the 1858 Treaty. The second is that navigation under Article VI of the 1858 Treaty cannot be effectively protected without the use of such boats. The same obtains for the defence of the common border and the common bays under Article IV of the Treaty.[283] Fourthly, it would be impossible, without adequate re-supplying of the border posts, to prevent or deter unlawful activities in the (land) border area (smuggling, trafficking in persons). It would also be impossible to fulfil official acts such as police investigations in a timely manner.

3.87 The re-supplying of border posts *via* the San Juan was prohibited by Nicaragua on 14 July 1998. It was re-established briefly two weeks later on the basis of the Cuadra-Lizano Joint Communiqué, which was subsequently unilaterally repudiated by Nicaragua.[284] The situation has been aggravated by Nicaragua's firing order reported on 1 October 2005, two days after the filing of Costa Rica's Application before this Court on 29 September 2005.[285]

3.88 This "firing order" was confirmed in a Nicaraguan Presidential Decree entitled "The Government of Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan Territorial Waters", approved on 28 September 2005 and published the following day. It states:

> "Article 1. – The Government of the Republic of Nicaragua will not allow armed navigation of foreign forces in national waters, as it is a flagrant violation of national sovereignty, the Political Constitution, and the law.
> Article 2. – The Nicaraguan Army is ordered to immediately increase its presence and permanent surveillance at the San Juan River in order to prevent, with all the means provided to it by national legislation, the transit of armed personnel, the relief and the transportation of weapons, ammunition and supplies, by foreign forces, as well as any other activity related to the illicit trafficking of arms in all of its aspects.

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[282] CRM, paras. 4.93, 4.100, 4.109, 5.114, 5.121 and 5.122.

[283] As the "common" Bay of San Juan has been silted up, it is practically inaccessible from the sea. To contribute to its defence, Costa Rica has no other choice but to proceed *via* the lower San Juan River.

[284] CRM, paras. 5.130-5.134. See also above, paragraph 2.12.

[285] CRM, paras. 5.136.

> Article 3. – The Ministry of the Interior, through the National Police Department, is ordered to proceed immediately to confiscate all the arms that are seized and take the offenders before the Nicaraguan Courts of Justice so they can be tried with the full severity of the law for the crimes they may have committed."[286]

This order also amounts to a violation of Article IX of the Cañas-Jérez Treaty, according to which neither Costa Rica nor Nicaragua

> "shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or on the San Juan river, or the Lake of Nicaragua."

3.89 It may be recalled that under the Second Article of the Cleveland Award navigation by vessels of the Revenue Service is explicitly permitted:

> "as may be related to and connected with [Costa Rica's] enjoyment of the 'purposes of commerce' accorded to her in [Article VI of the 1858 Treaty], *or as may be necessary to the protection of said enjoyment*." (Emphasis added.)

The last part of the phrase clearly points to defence matters. The Central American Court of Justice supported this reading when it pointed out that in the zone of common navigation, merchantmen as well as public revenue vessels have a free course over the River and free access to both banks.[287]

3.90 Nicaragua argues that when modifying Rives' draft award, President Cleveland restricted Costa Rica's right to navigate with public vessels to navigation connected with the purposes of commerce.[288] A careful perusal of the Rives draft[289] shows, however, that the President correctly gauged the scope of Costa Rica's right. In its original version, Rives' draft had pointed out that Costa Rica's privileges were the same as those of any other nation in time of peace. In his Second Report of 2 March 1888, Rives explained those "privileges" as follows:

> "Except in the case of the Dardanelles, it is understood that civilized nations, at the present day, impose no restrictions upon the friendly visits of foreign men of war in time of peace; and this general usage may be said to constitute an imperfect right entitling such vessels to claim hospitality."[290]

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[286] Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, Nicaraguan Official Gazette No. 188 of 29 September 1995: CRR, Annexes, Vol. 2, Annex 69.

[287] For the precise wording, see above paragraph 3.80.

[288] NCM, para. 4.1.15.

[289] NCM, Vol II, Annex 72, pp. 258-259.

[290] NCM, Original Documents deposited within the Registry, Part II, Annex 71, p. 217.

Thus Rives' proposal was simply that Costa Rica's public vessels should receive the treatment extended to those of any other nation – no more, no less. Accordingly, he suggested the following text to the President:

> "Second. The Republic of Costa Rica has the same privileges of navigating the River San Juan with vessels of war or of the revenue service as civilized nations usually accord in their territorial waters to the public vessels of friendly powers in time of peace; but no other or greater privileges."[291]

President Cleveland disagreed, considering that Costa Rica held more than simply a "privilege" enjoyed by everybody. This is why he ruled that Costa Rica's public vessels were entitled to their own, specific treaty right to navigate on the River. His decision was couched in the following terms:

> "*Second.* The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the purposes of commerce accorded to her in said article, or as may be necessary to the protection of said enjoyment."[292]

3.91 This would by itself be sufficient to prove a right of revenue vessels to navigate on the San Juan, a right which Nicaragua, after a long period of uncontested and peaceful exercise, suddenly prohibited in 1998.[293] The solid practice supporting Costa Rica's claim is attested to in a number of affidavits annexed to the Memorial.[294] There are also letters addressed by the Costa Rican Border Police of Sarapiquí to the Minister of Public Security in 1991, by the Costa Rican Atlantic Border Police, Sarapiquí, to the Director of the Costa Rican Civil Guard in 1992, and by the Border Police, Sarapiquí, to that Director, also in 1992.[295] These letters offer an insight into the daily lives, worries and difficulties of forces entrusted with guarding the border. One of the complaints voiced related to the need for more boats and fuel. It would certainly not have been made if, at that time, the boats in question had been unable to circulate on the San Juan River. Indeed, as shown in Sketch Map 3 opposite page 177 of this Reply, many of the communities covered by the area of jurisdiction of the Costa Rican Atlantic Border Police in Sarapiquí, such as Palo Seco, Cureña, Isla Morgan, Cureñita, Remolino Grande, Remolinito, Caño Tambor, Caño Copalchí, Boca Las Marías, Boca La Tigra, etc., lie on the Costa Rican bank of the San Juan River. In the years covered by the above correspondence there was a steady presence of Costa Rican public vessels on the San Juan.[296] The evidence summarised above reveals a uniform and clear pattern based on texts that are equally clear.

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[291] NCM, Vol II, Annex 72.

[292] CRM, Annexes, Vol 2, Annex 16; see also NCM, Vol II, Annex 72.

[293] Nicaraguan Presidential Decree No. 65 of 2995 of 28 September 2005, Nicaraguan Official Gazette No. 188 of 29 September 2005: CRR, Annexes, Vol 2, Annex 69; "Neighbours from the San Juan plea for help", *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

[294] CRM, Annexes, Vol 4, Annexes 88, 90, 94 and 103.

[295] Costa Rican Police Major, Francisco Cordoba Cordoba, to Costa Rican Minister of Public Security, Luis Fishman Z., Note No. C.D. 0666-91, 19 August 1991: CRR, Annexes, Vol 2, Annex 36; Costa Rican Police Major and Chief of Post, Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.D.O. 81-92, 29 April 1992: CRR, Annexes, Vol 2, Annex 37; Costa Rican Chief of Post, Major Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.A. 372-12, 25 May 1992: CRR, Annexes, Vol 2, Annex 38.

3.92 Nicaragua suggests that Costa Rica's own conduct is to the contrary. According to Nicaragua, Costa Rica accepted in the 1998 Cuadra-Lizano Joint Communiqué that passage by public vessels would be subjected to conditions and to a regime of notification. But a State endowed with a right is entitled to negotiate the modalities of its exercise without thereby jeopardising its existence. Moreover Costa Rica was prepared to accept a mechanism of notification, as opposed to one of authorisation, which would have destroyed the right. In fact, Nicaragua's argument demonstrates the opposite of what was intended. By proposing a system of notification and rejecting one of authorisation, Costa Rica indicated that it had a *right*, which it was unwilling to forego.

3.93 According to another Nicaraguan argument, Costa Rica's rights in the area covered by Article IV of the Cañas-Jérez Treaty can only be exercised "from its shore".[297] This is not borne out by the relevant texts. Article IV of the 1858 Treaty speaks of the obligation of custody (*guarda*) "with all the efficiency within [the Contracting States'] reach". Concerning Costa Rica, "within its reach" does not necessarily correspond to "from its shore". It could equally well mean that each State shall act with maximum efficiency.

3.94 A final Nicaraguan argument about re-supply of Costa Rican border posts is that there is not only no right for Costa Rica but also no need. In the face of all evidence, Nicaragua contends that Costa Rica has all the necessary facilities to re-supply its border posts along the San Juan River. In fact those posts *were* supplied from 1998-2005, when the moratorium set by the Declaration of Alajuela of 2002 expired.[298] This calls for the following observations:

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[296] See discussion in this Reply, Appendix, paragraphs A.33-A.44 and CRR, Annexes, Vol 2, Annexes 36, 37 and 38.

[297] NCM, paras. 4.2.31-4.2.32.

(i) It is simply not true – and constant repetition does not make it any more true – that Costa Rica disposes of the necessary facilities to re-supply its border posts by land and by air. For the lack of such facilities the station of La Cureña had to be closed,[299] while other posts, deprived of local navigation, are now operating at a lower level of efficiency.

(ii) If Costa Rica has not actively pursued the matter of the re-supplying of the boundary posts between 2002 and 2005, this is not because it did not believe in its claim or because re-supplying *via* the river was not necessary or useful. It was because it wished to minimise the – very real – risk of confrontation and escalation.

(iii) In any event, the rights granted to Costa Rica by the Treaty of Limits are unconditional and perpetual. They are not dependent on need, use or the non-availability of alternative means.

(4) Conclusion

3.95 Under the relevant treaty and other texts Costa Rica is entitled to navigate with public vessels manned with police agents carrying normal arms on the part of the San Juan open to common navigation, in order to protect its freedom of navigation and to enable it to safeguard the River and to defend the boundary areas as well as the common bay of San Juan del Norte, located in the east of the common boundary. This right is confirmed by a practice the consistency of which was broken by Nicaragua as recently as 1998. Its existence is not dependent on the need to exercise it, although that need does exist in the present case.

E. Related Rights

3.96 Although Nicaragua assumes that Costa Rica can have no rights except those expressed in the 1858 Treaty, in fact President Cleveland refers in his Award to related rights in stating that navigation "may be related to and connected with [Costa Rica's] enjoyment of the 'purposes of commerce'".[300] Costa Rica has identified four related rights that are being breached by Nicaragua.

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[298] CRM, Annexes, Vol 2, Annex 29.

[299] The post of La Cureña was located on the top of a hill surrounded by tropical rain forest. It is difficult or impossible to land any helicopters there. Access by land is also most difficult in the absence of good roads.

(1) Flags

(a) Flag issues as "related rights"

3.97 Article VI of the 1858 Treaty grants Costa Rica the "perpetual right of free navigation". A corollary is the right of Costa Rican vessels to fly their own flag. This is a right "related" to the right of free navigation.

3.98 Another "related" right is that of not having to fly the Nicaraguan flag. As will be shown, even a failure to comply with domestic legislation calling for the display of the Nicaraguan flag – if it exists – will not allow the territorial State to suspend the right of navigation granted to a foreign State.

(b) Nicaragua's position

3.99 In its Counter-Memorial, Nicaragua points out that in the territorial sea foreign vessels authorised to navigate in it "should" carry the flag of the host State and that "such is the case of the San Juan River". This, it adds, derives "not only from international courtesy, but from international practice". It refers to its own diplomatic correspondence, cited by Costa Rica.[301] Indeed, in a Note of 3 August 2001, the Nicaraguan Foreign Minister wrote that, in the area of maritime navigation, foreign ships entering sovereign waters (territorial sea, archipelagic waters, internal waters and, possibly, straits) fly the flag of the host State, which has to be placed at a higher level than the flag of their own State.[302] This is characterised as "international custom and courtesy".[303] If the host State's flag is not raised by a vessel, Nicaragua continues, passage will be refused as a consequence of Nicaragua's sovereignty over the waters of the River.[304]

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[300] CRM, Annexes, Vol 2, Annex 16.

[301] NCM, para. 5.3.2.

[302] CRM, Annexes, Vol 3, Annex 72.

[303] NCM, para. 5.3.3.

[304] NCM, paras. 5.3.3 and 5.3.4.

(c) Costa Rica's position

3.100 The hoisting of the Nicaraguan flag was never required in the past. That requirement was suddenly imposed in August/September 1998; at the same time, Costa Rican flags were banned. Costa Rica protested and the practice ceased. After the present Application was filed in October 2005, it re-appeared in the form of a requirement that every Costa Rican boat had to fly the Nicaraguan flag.[305] This occasioned considerable dismay on the Costa Rican bank of the River.[306] Statements by the Mayor of San Carlos and by José Moreno Rojas report that the inhabitants of the border region were unsettled over the new measure and that they were not able "to acquire flags from the neighboring country in the area where they live."[307]

3.101 In a letter of 20 October 2005 the Foreign Minister of Costa Rica requested the withdrawal of the measure.[308] On 9 November of the same year, the Nicaraguan Minister of Foreign Affairs refused to comply.[309]

3.102 The requirement of flying the Nicaraguan flag, formulated in 1998 and re-introduced in 2005, has survived to this day, as is shown by witness statements joined to Costa Rica's Memorial[310] as well as by two affidavits accompanying the present Reply. On 29 July 2007, Víctor Julio Vargas Hernández, a Costa Rican official, testified not only that Nicaragua maintains the requirement of flying its flag when navigating on the San Juan but that it requires "the flying only of the Nicaraguan flag on Costa Rican vessels." In the same affidavit Leonel Morales Chacon confirmed that the flag requirement persists.[311] The current Nicaraguan position is in contrast to a note addressed in 1868 by the Nicaraguan Minister to the United States to Secretary of State Seward and related to the vessels of the Central American Transit Company. In that note it was explained that only Nicaragua and Costa Rica could fly their flags on the San Juan River.[312]

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[305] CRM, para. 5.87.

[306] CRM, Annexes, Vol 3, Annex 72.

[307] CRM, Annexes, Vol 4, Annex 108; CRM, Annexes, Vol 6, Annex 235.

[308] CRM, Annexes, Vol 3, Annex 81.

[309] CRM, Annexes, Vol 3, Annex 82.

[310] CRM, Vol. 4, Annexes 84-87, 91, 95, 101 and 108.

[311] Affidavit of Víctor Julio Vargas Hernández, Marleny Royas Vargas, Mario Sala Jiménez and Leonel Morales Chacón, 28 July 2007: CRR, Annexes, Vol 2, Annex 54.

[312] CRM, para. 4.10 and CRM, Annexes, Vol 6, Annex 207, p. 108.

(d) Analysis

3.103 Considering the timing of their introduction and re-introduction, it seems that the measures described above are retaliatory in character and are meant to irritate and discourage the inhabitants of the Costa Rican bank of the San Juan. They seek to make a poor and defenceless population bear the brunt of disagreements between the two Governments.

3.104 Nicaragua's main contention is that ships navigating in foreign maritime waters are required to fly their own flag as well as, on a higher level, that of the receiving State. According to Nicaragua, the same rule applies to river navigation, especially in situations such as the present. These arguments are fragile. A quick perusal of two classic texts on the law of the sea shows that there is no rule of international law in the sense advocated by Nicaragua.[313] Possibly such rules could be found in some of the "laws and regulations" enacted by coastal States under Article 21 of the 1982 United Nations Convention on the Law of the Sea to govern innocent passage. But contraventions of such rules do not authorise refusal of innocent passage by the coastal State. Indeed, what matters for that State is not so much the display of the flag of the receiving State, but the identity and therefore the national flag of the vessel.

3.105 That much also applies to river navigation. The State exercising sovereignty over the river's waters will mainly be interested in which foreign ships are actually sailing on the river and, therefore, their nationality and flag, rather than in making these ships carry the local flag.[314] If the analogy between maritime and fluvial navigation suggested by Nicaragua were to be pursued, one might say that in both these areas it is the foreign ship's national flag that must be shown and not that of the receiving State, although there may be local legislation providing for the latter. So far no Nicaraguan legislation on this issue has been shown to exist. Even if it did exist, non-compliance with such legislation cannot possibly entail the refusal of rights of navigation secured by treaty and described as perpetual. Indeed perhaps the leading monograph on river navigation fails even to *mention* the issue, which is merely ceremonial.[315]

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[313] C.J. Colombos, *The International Law of the Sea*, 6^{th} rev. ed. (London: Longmans Green, 1967); L. Lucchini & M. Voelckel, *Droit de la mer*, Vol. II (Paris : Pedone, 1996).

[314] Colombos, 166-7 (§170).

[315] B. Vitanyi, *The International Regime of River Navigation*, (Alphen a.d.R.: Sijthoff & Noordhoff,

3.106 What Nicaragua has to say about flags is, in fact, a simple assertion with no supporting evidence, based on an amalgamation of precepts of fluvial and maritime navigation which is justified by nothing and alternately characterised as custom or courtesy. It cannot be both.

3.107 Prior to the recent measures taken by Nicaragua, Costa Rican vessels had for over a century freely used the area of common navigation of the San Juan. But Nicaragua sees no inconsistency between its former attitude and the present one. The more than secular tolerance shown by Nicaragua is not, in its view, relevant in international law; at the same time, Nicaragua extravagantly assimilates the rules of the law of the sea with those governing river navigation.

3.108 By contrast in 1868, in diplomatic correspondence with a third party – the United States – Nicaragua refused to the latter the right to sail ships under the American flag in the area of common navigation of the San Juan, explaining that Costa Rica, as a riparian, was the only State having the right to do so, besides Nicaragua. Nothing was said, at that time about any obligation to fly the Nicaraguan flag as well, nor about any hierarchy among flags.[316]

(2) Fisheries

(a) Fisheries as a "related right"

3.109 Costa Rica's Application to the Court refers to breaches of the perpetual right of free navigation and "related rights".[317] The customary right to subsistence fishing in the San Juan River is a "related right".[318] In its Counter-Memorial Nicaragua points out that the alleged right does not derive from the Cañas-Jérez Treaty of 1858, from the 1888 Award or the 1916 judgment.[319]

3.110 Nicaragua suggests that the only rights Costa Rica claims are those related to the 1858 Treaty or to texts connected with it and nothing beyond.[320]

1979).

[316] CRM, para. 4.10 and CRM, Annexes, Vol 6, Annex 207.

[317] CRM, para. 1.01.

[318] CRM, para. 5.187.

[319] NCM, paras. 5.1.2-5.1.4.

[320] NCM, para. 5.1.4.

Rights to fish are not, however, alleged to derive from the Treaty but from customary law the roots of which are found in the Royal Ordinance of 29 November 1540.[321] This leads Nicaragua to argue that Costa Rica contradicts itself.

3.111 The answer to be given is twofold. First it is up to Costa Rica, and not to Nicaragua, to formulate its claims. Second the right of the inhabitants of the Costa Rican shore to engage in subsistence fishing on the San Juan is "related" to the 1858 Treaty in that Nicaragua contends that that Treaty, by attributing to it the sovereignty over the waters of the River and granting Costa Rica only a perpetual right of free navigation, superseded other pre-existing rights such as any right to fish.[322] The latter issue is clearly connected with the Treaty.

(b) The existing practice and its character

3.112 Regarding the substance of the fisheries claim, Nicaragua asserts that it has never prevented, does not prevent and never will prevent subsistence fishing by residents of the Costa Rican shore.[323] Costa Rica takes note of this commitment. Unfortunately the affidavits presented in Costa Rica's Memorial show that Nicaragua *did* and *does* in fact prevent persons residing on the Costa Rican bank from engaging in subsistence fishing, and evidence annexed to this Reply confirm that the prohibition is ongoing.[324]

3.113 Nicaragua characterises these statements as "a handful" of testimonials,[325] but they are supported by further statements annexed to this Reply.[326] The collection of further statements is both difficult and unnecessary: difficult because potential witnesses are reluctant to come forth for fear of reprisals on the part of Nicaraguan authorities; unnecessary because Costa Rica is not required to duplicate testimonies that are clear, consistent and uncontradicted, all the more since Nicaragua has admitted that, albeit "as a matter of courtesy and convenience" it has "usually tolerated a limited use of the San Juan for non-commercial fishing by Costa Rican riparians".[327]

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[321] CRM, Annexes, Vol 2, Annex 1.

[322] NCM, para. 5.1.13.

[323] NCM, para. 5.1.15.

[324] CRM, Annexes, Vol 4, Annexes 106, 107,108 and 109; Victor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

[325] NCM, para. 5.1.8.

[326] Victor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

3.114 Taken together, the evidence yields the following conclusions: (i) riparians have been fishing in the San Juan without problems for many years; (ii) they have done so for subsistence purposes; and (iii) despite its emphatic denials,[328] Nicaragua has, since the filing of the Application by Costa Rica, prevented subsistence fishing by Costa Rican riparians. This is why, though appreciating Nicaragua's promise not to obstruct such fishing in the future, Costa Rica respectfully asks the Court to declare that there exists a right of subsistence fishing in the San Juan River.

3.115 Nicaragua contends that its tolerance of fishing from the Costa Rican bank must not be viewed as a right but as a token of courtesy and tolerance and that Costa Rica has not succeeded in establishing the existence of a uniform practice having legal effect.[329] Moreover, whatever may have been the situation in the distant past has been erased by the 1858 Treaty's silence on the matter of fishing coupled with the attribution to Nicaragua of sovereignty over the waters of the San Juan. In its Counter-Memorial, Nicaragua makes light of the arguments of Costa Rica which had, in its Memorial, drawn attention to similar issues in Africa.[330] Finally, much is made[331] of a Charter of 1573[332] which allegedly ended whatever fishing rights may have been conceded in the preceding Charter of 29 November 1540.[333]

3.116 The first argument is over-familiar: a practice which may have been followed from time immemorial – an important trace of which is found in the 1540 Charter – is said by Nicaragua to be based on nothing but goodwill and tolerance. As to Nicaragua's argument that the 1573 Charter superseded that of 1540, the former said nothing at all about fishing.[334]

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[327] NCM, para. 5.1.6.

[328] NCM, paras. 5.1.14-5.1.16.

[329] NCM, para. 5.1.6.

[330] NCM, para. 5.1.9; cf CRM, paras. 4.124-4.127.

[331] NCM, para. 5.1.12.

[332] NCM, Vol. II, Annex 86.

[333] CRM, Annexes, Vol. 2, Annex 1.

3.117 The pattern of practice described above having been followed for so long one may safely assume that, unless the opposite can be shown conclusively, it has taken on a patina of custom. In situations such as the present, had it wished to prevent the formation of a local custom, Nicaragua could and should have made it clear long ago that it accepted Costa Rican subsistence fishing only as a matter of tolerance. Instead Nicaragua continued its practice of tolerance after the conclusion of the Cañas-Jérez Treaty in 1858 and until very recent times. It did so quite independently of that Treaty and of the sovereignty over the River's waters conferred on it.

3.118 Nicaragua contends that the fisheries practice invoked by Costa Rica lacks uniformity. The testimonies submitted by Costa Rica are, however, consistent. With one exception, they emanate from persons who have long lived in the area and who until recently have fished in the River without Nicaraguan interference.

3.119 The way in which Nicaragua brushes off Costa Rica's arguments about the subsistence fishing rights of African border populations[335] shows a thorough misunderstanding of Costa Rica's position: the idea is not to establish the existence of a general customary right to subsistence fishing for the population of a State whose bank forms a boundary but to demonstrate that it often happens, in such situations, that local populations are given access to the river's fisheries either on a conventional or a customary basis.[336]

(c) Conclusion

3.120 There has been, from time immemorial, a practice allowing the inhabitants of the Costa Rican bank of the San Juan to fish in that River for subsistence purposes. This practice survived the Treaty of 1858.

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[334] See this Reply, paragraph 3.110 and Appendix, paragraph A.09.

[335] NCM, paras. 5.1.9-5.1.11.

[336] CRM, paras. 4.124-4.127.

3.121 The disagreement between the parties may be summarised in two points:

(i) Nicaragua claims not to be preventing Costa Rican riparians from fishing, but in fact there have been instances where they have been prevented from subsistence fishing; it promises to continue to allow the riparians to do so and while Costa Rica takes note of that promise, Costa Rica maintains that Nicaragua has recently prevented such fishing.[337]

(ii) According to Costa Rica, its riparian population enjoys a customary right to engage in subsistence fishing, a claim resisted by Nicaragua which argues that no such custom has emerged and that the existing practice is one based on goodwill and toleration.

(3) Landing Rights

3.122 In addition to attributing the sovereignty over the waters of the San Juan to Nicaragua and a perpetual right of free navigation to Costa Rica, Article VI of the 1858 Treaty provides:

> "[t]he vessels of both countries shall have the power to land indiscriminately on either side of the river, at the portion thereof where the navigation is common; and no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both governments."

3.123 Costa Rica's right was confirmed by the 1916 Judgment of the Central American Court of Justice:

> "Costa Rica possesses in the San Juan River, for purposes of commerce, permanent rights of free navigation from its outlet as far up as three miles below Castillo Viejo, and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation is common."[338]

3.124 Nicaragua does not contest the existence of Costa Rica's right to land on the Nicaraguan bank[339] which is clearly "related" to the rights of navigation on the River. Its main comments are: (i) that the right in question entails the correlative duty to conform to the local State's regulations on health and security matters;[340] (ii) that it only operates in the framework of what Nicaragua means by navigation for "purposes of commerce", namely, "articles of trade";[341] and (iii) that mooring on the opposite river bank does not include a right of trading: "The Treaty of 1858 was not a free trade agreement."[342]

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[337] This Reply, paragraphs 4.56-4.61.

[338] CRM, Annexes, Vol 2, Annex 21, p. 219.

[339] NCM, para. 4.1.47.

[340] NCM, para. 4.1.48.

3.125 The main problem here lies not with the right to land on the opposite bank as such but with the reduced scope attributed to it on account of Nicaragua's interpretation of Costa Rica's right of navigation (navigation "with articles of trade" instead of "for purposes of commerce"), an interpretation refuted earlier in this Chapter.[343]

3.126 Regarding the purported obligation to conform to local regulations in health and security matters, all depends on the scope of such regulations and on their application. They must be conceived and applied reasonably, so as not to erode the right to land nor the right to navigate "for purposes of commerce".

3.127 It is true that the 1858 Treaty was not intended to be a free trade agreement. Assuming, however – *quod non* – that the right of navigation enjoyed by Costa Rica is indeed limited to "articles of trade" and assuming also that landing on the opposite shore does not encompass a right to engage in trade on that shore, the result would be that the "perpetual right to free navigation" attributed to Costa Rica is reduced to "navigation for purposes of trading with other Costa Ricans." This, in itself, shows that Nicaragua's position is completely unreasonable.

3.128 It may be concluded that, as a "related" matter, the right to land on the Nicaraguan bank must be appreciated in the framework of the interpretation given in this Chapter of Costa Rica's perpetual right of free navigation: it cannot be viewed as a purely technical right excluding activities related to commerce. Furthermore, the health and security regulations enacted by Nicaragua must be reasonable, so as not to deprive Costa Rica's rights of all meaning.

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[341] NCM, para. 4.1.47.

[342] NCM, para. 4.1.48.

[343] See above, paragraphs 3.39-3.78.

(4) Facilitation of traffic

3.129 In December 1948, with the support of Nicaragua, Costa Rican rebels stirred up a civil war and attempted to overthrow the Costa Rican Government. Costa Rica solicited the assistance of the Inter-American system, under whose auspices the Pact of Amity of 21 February 1949 was concluded.[344] In that instrument, the two States agreed to settle their disputes peacefully by applying the Pact of Bogotá.

3.130 A second attempt to overthrow the Costa Rican Government was undertaken in 1955 by the same rebel faction, supported once more by Nicaragua. Again, the parties ended up before the Council of the Organization of American States which brokered the Agreement of 9 January 1956.[345] That Agreement was intended to "maintain the close friendship as befits two fraternal and neighbouring peoples, and to avoid in future any dispute which may disrupt their fraternal relations…"[346]

3.131 Pursuant to Article I – signifying the importance given to this matter in the 1956 Agreement – the parties "shall collaborate to the best of their ability in order to carry out those undertakings and activities which require a common effort by both States and are of mutual benefit". One of these activities is singled out by Article I, namely, that of facilitating and expediting traffic on the Pan-American Highway and on the San Juan River, "within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888". In particular, the parties undertake to "facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other."

3.132 Article II of the Agreement calls for border surveillance and the prevention of the illegal entry of weapons or armed groups from the territory of one Party into that of the other. Articles III and IV require each Party to prevent, on its territory, participation in subversive undertakings against the other Party, while Article IV deals with the application of Articles I to III and V to X of the Havana Convention Concerning the Duties and Rights of States in the Event of Civil Strife of 20 February 1928.[347]

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[344] CRM, Annexes, Vol 2, Annex 24.

[345] CRM, Annexes, Vol 2, Annex 24. For a short historical description, see CRM, paras. 2.51-2.52.

[346] See CRM, Annexes, Vol 2, Annex 24, Preamble.

3.133 Nicaragua expresses the view that the 1956 Agreement is not germane to the issue as it focused on ending civil strife and preventing future insurrectionary activities, and that it contained no obligations beyond those resulting from the 1858 Treaty and the Cleveland Award. As the latter texts only provide for a right of navigation "*con objetos de comercio*" meaning, according to Nicaragua, "with articles of trade", the duty to facilitate and expedite traffic on the San Juan River, stipulated in Article I of the 1956 Agreement, only operated within that framework. This being so there is nothing to facilitate or expedite.[348]

3.134 If this were true Article I, placed at the head of the operative provisions of the Agreement, would be bereft of meaning, which cannot be presumed, given the importance of the 1956 Agreement and the circumstances of its conclusion. Costa Rica has always interpreted "*con objetos de comercio*" as meaning "for purposes of commerce".[349] This interpretation, which was accepted by Nicaragua for a long time, gives full meaning to Article I of the 1956 Agreement: there is a perpetual right of *free* navigation which the parties, in Article I, undertake to render more effective. This is an obligation, squarely placed in the centre of the Agreement rather than in its preamble or somewhere on its periphery. By practically nullifying Costa Rica's perpetual right of free navigation as from the mid-1990s, Nicaragua has disregarded the duty to facilitate and expedite traffic on the San Juan River.

3.135 To this one may add that, under Article I of the 1956 Agreement, the parties have also accepted to facilitate transport services offered by enterprises belonging to nationals of one State through the territory of the other. On account of the conditions prevailing in the border area, this effectively means transport services offered by Costa Rican operators on the San Juan, which Nicaragua considers its territory. Accordingly, by entering into the 1956 Agreement Nicaragua recognised what it now contests: that Costa Rica's perpetual right of free navigation encompasses the transportation of persons, including tourists.[350]

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[347] 134 LNTS 45.

[348] NCM, paras. 6.2.1-6.2.10.

[349] See above, paragraphs 3.39-3.78.

F. The issue of "Border Courtesy"

(1) What is meant by "Border Courtesy"?

3.136 In its Counter-Memorial, in relation to the practice followed in matters of navigation and defence, Nicaragua devotes some attention to what it calls "border courtesy", that is, behaviour motivated not by the idea of fulfilling a legal duty but by the wish to be a good neighbour. Other expressions used by Nicaragua, such as "toleration" and "*ex gratia* concessions", carry a similar meaning. When making reference to such behaviour on its part, Nicaragua seeks to convey that this behaviour was not inspired by any sense of legal duty and was not, therefore, legally relevant for the interpretation of the 1858 Treaty and of the 1888 Award. A variation of this line of argument is the assertion that certain agreements entered into by the two States, such as the Cuadra-Lizano Joint Communiqué of 8 September 1995, have no normative value, or that they are null and void.[351]

(2) Nicaragua's strategy of denial

3.137 Nicaragua's strategy, as outlined in its Counter-Memorial, is to profess a wish to cooperate with its neighbours, particularly Costa Rica, to extend courtesies to them, and to apply principles of good neighbourliness.[352] It claims to follow these policies, "because she is convinced they are principled and right, not out of any sense of legal obligation",[353] and regrets that Costa Rica has repaid these kindnesses by "engaging in patterns of conduct designed to enlarge her existing rights or even to establish new ones". In addition, speaking of matters such as sports, tourism, defence, customs, migration and illegal trafficking, Nicaragua points out:

> "it is possible to establish mechanisms of border cooperation through an agreement… Nicaragua has always been and continues to be willing to negotiate and implement these types of agreements as has already been done in the past."[354]

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[350] NCM, paras. 4.1.37-4.1.43.

[351] NCM paras. 3.2.8 and 3.2.12.

[352] NCM, paras. 6.1.1-6.1.2.

[353] NCM, para. 6.1.1.

[354] NCM, para. 4.3.7.

This passage may, incidentally, reveal a contradictory attitude: on the one hand, Nicaragua advocates the conclusion of agreements to organise border cooperation while, on the other, it denies relevance or validity to most existing agreements. It may be observed that if Nicaragua's attitude really existed, the present dispute would not have arisen, or would have been resolved by agreement.

3.138 In fact Nicaragua aims at establishing a virtual monopoly of navigation for its own benefit, reducing Costa Rica's perpetual right of free navigation to a privilege the content of which would be determined, essentially, by Nicaragua itself. This is to be achieved partly by a narrow interpretation of the right of navigation, partly by asserting that activities and situations acquiesced in over time by Nicaragua had resulted from forbearance on the part of a country which, being the territorial sovereign, can do whatever it pleases, and partly by issuing threats.

3.139 Nicaragua accuses Costa Rica of behaving as if the boundary between them were located, not on the Costa Rican bank of the San Juan but in the middle of the River.[355] What Costa Rica is attempting is a "crude revision" of the 1858 Treaty[356] through claims characterised as abusive.[357] To Nicaragua, Costa Rica has constantly claimed new navigation rights:

> "through a practice of abusing permission to navigate … or establishing a pattern of requesting and receiving permission to navigate, then doing so without permission, claiming justification in the 1858 Treaty and Cleveland Award."[358]

Nicaragua has responded to this by "enforcing her laws," whereupon Costa Rica has accused Nicaragua of violating the Treaty and the 1888 Award.[359] According to Nicaragua, this is the way in which Costa Rica has proceeded regarding the alleged right of public vessels to re-supply border posts and also in relation to sporting activities and tourism.[360]

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[355] NCM, para. 4.1.5.

[356] NCM, para. 4.3.8.

[357] NCM, para. 4.3.20.

[358] NCM, para. 6.2.17.

[359] NCM, paras. 6.1.3, 6.2.17 and 6.1.28.

[360] NCM, para. 4.3.27.

3.140 This description misrepresents the Costa Rican claim. Nicaragua has a long tradition of eroding Costa Rica's rights of navigation and protection by incessantly narrowing their scope and by attempting to make these rights subservient to its own discretion. Practices relating to the rights attributed to Costa Rica by the 1858 Treaty, as supplemented by the 1888 Award, are given no status as treaty or customary law, or as practice subsequent to the 1858 Treaty and the Cleveland Award.

(3) Analysis of some arrangements and practices

(a) The right of navigating public armed vessels

3.141 As pointed out in Costa Rica's Memorial,[361] Costa Rican armed revenue vessels navigated in the lower part of the river without any objection from Nicaragua, as is shown by the "Adela" incident and by other subsequent practice.[362] This state of affairs, which continued until 1998, is characterised as a pure "border courtesy" by Nicaragua, after a practice stretching over more than one hundred years based on the Treaty of Limits, the 1888 Award and the 1916 judgment. In the latter the Central American Court of Justice referred to:

> "[t]he proposition that the rights of navigation on the San Juan River that were confirmed in Costa Rica do not extend to vessels of war, but simply to vessels devoted to revenue and defensive purposes - an interpretation that in no way detracts from the doctrine set forth concerning the practical ownership pertaining in great part to Costa Rica over the

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[361] CRM, para. 4.85.

[362] CRM, paras. 4.85-4.86. See also this Reply, paragraphs 1.15 and Appendix, paragraphs A.33-A.44. See also Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 20 October 1915: CRR, Annexes, Vol 2, Annex 31; Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 18 December 1915: CRR, Annexes, Vol 2, Annex 32; Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 26 July 1968: CRR, Annexes, Vol 2, Annex 33; Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 29 July 1968: CRR, Annexes, Vol 2, Annex 34; Note from the Revenue Guard of Boca de San Carlos to Chief of Personnel of the General Inspectorate of the Treasury, 5 August 1968: CRR, Annexes, Vol 2, Annex 35; Costa Rican Police Major, Francisco Cordoba Cordoba, to Costa Rican Minister of Public Security, Luis Fishman Z., Note No. C.D. 0666-91, 19 August 1991: CRR, Annexes, Vol 2, Annex 36; Costa Rican Police Major and Chief of Post, Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.D.O. 81-92, 29 April 1992: CRR, Annexes, Vol 2, Annex 37; and Costa Rican Chief of Post, Major Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.A. 372-92, 25 May 1992: CRR, Annexes, Vol 2, Annex 38. Further evidence of Costa Rican official navigation is annexed to this Reply in the form of a "departure clearance certificate" issued by Costa Rican authorities, as explained in CRM, para. 5.07: "Departure Clearance Certificate" issued by the Costa Rican Revenue Guard in Boca del río Sarapiquí to a Costa Rican Park Ranger, 15 June 1968: CRR, Annexes, Vol 2, Annex 679b).

San Juan River because navigation with vessels of war, aside from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty."[363]

3.142 The interpretation yielded by that practice and confirmed by a decision of an international tribunal is dismissed by Nicaragua, which sees it as a mere "courtesy" within a framework of cooperation and neighbourliness.[364] In 1998 Nicaragua banned armed public vessels from the San Juan, arguing that their presence was not authorised under the 1858 Treaty and conveniently forgetting that the Second Article of the Cleveland Award, which has force of *res judicata* for the two States, confirms Costa Rica's right to:

> "navigate [the San Juan] with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in [Article VI], or as may be necessary to the protection of said enjoyment."[365]

3.143 Nicaragua subsequently advocated a solution by proposing a system of permits granted on a temporary basis. Costa Rica proposed a system of notification which would have left intact Costa Rica's right to navigate while dealing with Nicaragua's security concerns. This compromise was not, however, acceptable to Nicaragua, which insisted on a system of authorisation.[366]

3.144 Evidently Nicaragua was no longer willing to conform to the instruments and texts of 1858, 1888 and 1916. But Nicaragua's attempt to modify the interpretation previously given to those instruments and texts cannot have ended more than a century of concordant practice, transforming rights regularly exercised to privileges on mere goodwill.

(b) The Cuadra-Castro Joint Communiqué of 8 September 1995

3.145 The 1995 Cuadra-Castro Joint Communiqué is an agreement between the Nicaraguan Army and the Ministry of Public Security of Costa Rica to coordinate operations in the border areas of the two States "thereby joining forces in the battle against the illegal trafficking of persons, vehicles, contraband of any nature and joint operations..."[367] As Nicaragua notes, the Communiqué is not specifically related to the border at the San Juan.[368] But one can scarcely say, as Nicaragua does, that the Communiqué lacked normative content since it provided for cooperation in the border regions of the two States; nor can it be asserted that it did not apply to the common navigation area of the San Juan River.

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[363] CRM, para. 4.92; CRM, Annexes, Vol 2, Annex 21.

[364] NCM, paras. 6.1.5-6.1.23.

[365] CRM, Annexes, Vol 2, Annex 16, p. 98.

[366] NCM, paras. 6.1.16-6.1.20. See CRM, Annexes, Vol 3, Annexes 64, 65 and 66.

(c) The Cuadra-Lizano Joint Communiqué of 30 July 1998

3.146 In the Cuadra-Lizano Joint Communiqué of 30 July 1998 the Minister of Defence of Nicaragua and Costa Rica's Minister of Government, Police and Public Security express their respect for Nicaraguan sovereignty over the waters of the San Juan and for Costa Rica's rights of navigation. The text allows Costa Rican armed public vessels to navigate on the River to relieve and re-supply boundary posts on the Costa Rican side, provided that notice has been given and that the Costa Rican agents in those vessels only carry their normal arms. Nicaraguan authorities may accompany them on their journey, and movements must be reported to the Nicaraguan border posts along the way.

3.147 This Communiqué has the characteristics of a legally binding text.[369] Moreover, it takes into account the interests of both sides: Costa Rica is allowed to re-supply boundary posts which are difficult to access or inaccessible on land or by air, while Nicaragua is fully informed of such activities. Nicaragua's excuse for jettisoning this instrument is that it is "certainly not …self-executing";[370] the other is that it was "legally null and void and non-existent", in particular because it was signed by persons lacking treaty-making power and because it was found, "after due analysis, … that it could infringe the national sovereignty of Nicaragua."[371] The declaration of nullity made by the Foreign Minister of Nicaragua was rejected by the Costa Rican Foreign Minister on 12 August 1998.[372]

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[367] CRM, Annexes, Vol 2, Annex 27, Point 1.

[368] NCM, para. 6.1.8.

[369] NCM, para. 3.2.11.

[370] NCM, para. 3.2.11.

[371] NCM, para. 3.2.12.

[372] CRM, para. 3.31 and CRM, Annexes, Vol 3, Annex 50.

3.148 This recital shows the inflexibility of Nicaragua's views on sovereignty. Nothing can grow next to it: Costa Rica's perpetual right of free navigation is regarded as nothing but an empty shell. Wherever an agreement supporting Costa Rica's claims appears, Nicaragua either declares it void or considers it as being deprived of normative content.

(d) Presidential Letters exchanged on 28 and 29 June 2000

3.149 On 28 June 2000, the President of Costa Rica suggested to his Nicaraguan counterpart the revival of the regime applied prior to 1998 to the navigation of Costa Rican public vessels on the San Juan, namely, that Costa Rican vessels would *inform* the Nicaraguan authorities. The President of Nicaragua indicated his willingness to resume cooperation provided that *authorisation* would have to be sought for every voyage and that navigation by such vessels would neither imply the exercise of jurisdiction on the river nor adversely affect Nicaragua's territorial sovereignty. This exchange was nugatory – but it now prompts Nicaragua to conclude: (i) that its President had made it clear that the arrangement prior to 1998 applied as only a *modus operandi*; (ii) that it had been assented to *ex gratia*; and (iii) that the President's Costa Rican colleague had accepted this view.[373] This cannot, of course, be true since the President of Costa Rica, who would have agreed to a system of information, refused to accept one of authorisation.

3.150 While referring to the exchange of notes between the Presidents of Costa Rica and Nicaragua that took place in June 2000, Nicaragua's Counter-Memorial quotes part of the Conclusion of Resolution 2001-08239 dated 14 August 2001, of Costa Rica's Constitutional Chamber. Nicaragua first suggests that:

> "…the President of Costa Rica accepted in his note of 28 June 2000 that Costa Rica did not have a right to navigate on the San Juan with 'police and their police equipment' without informing 'Nicaraguan authorities…each time they patrol the San Juan.' ….it is clear from the 29 June 2000 note of the President of Nicaragua that Costa Rica had no right to navigate on the San Juan for the purpose of provisioning border posts but that Nicaragua was willing to consider allowing Costa Rican police authorities to travel on the lower San Juan for purpose of provisioning the posts on that part of the river so long as they were given permission in each case by the Nicaraguan authorities."[374]

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[373] NCM, paras. 6.1.18-6.1.19. See also CRM, paras. 3.38-3.39.

[374] NCM, para 6.1.19

3.151 Nicaragua's Counter-Memorial goes on to explain that the exchange of notes between the two Presidents was submitted to the "Fourth Constitutional Court"[375] which indicated that it found nothing in President Rodríguez's note of 28 June which "ran counter to Costa Rica's position." Nicaragua's Counter-Memorial quotes the judgment as follows:

> "VIII – Conclusion. On the basis of the foregoing arguments, this Court concludes that the diplomatic note sent by the President of the Republic of Costa Rica on 28 June 2000 to the President of Nicaragua, is not unconstitutional, and consequently declares the present action [of unconstitutionality] without basis, dismissing it from the Court."[376]

3.152 Nicaragua seeks to represent that Costa Rica's own courts have denied that Costa Rica has a right to navigate on the San Juan for the purpose of supplying border posts. Of course this is not true. A careful reading of Resolution 2001-08239 of 14 August 2001 shows the opposite: that Costa Rica has a right to free navigation on the San Juan. The Court held:

> "It is not contradictory, inasmuch as the said instruments provide that Nicaragua has complete sovereignty and authority over the San Juan River, *while Costa Rica holds the perpetual right to use its lower banks for commercial, revenue and security purposes*. The referenced note states only that the Government of Costa Rica shall inform its peer in Nicaragua each time its police force must navigate on the San Juan River with law enforcement equipment. It is worth noting that in the note at issue, *the said navigation is not subject to obtaining a permit, but to—as was stated—simple communication*, which is entirely in keeping with the terms of the instruments governing the matter. The possibility for navigation by other types of Costa Rican boats is not limited in any way whatsoever either, and there is no waiver of any other rights held by Costa Rica in respect of the lower banks of the San Juan River."[377] (emphasis added)

3.153 It was after this consideration that Costa Rica's Constitutional Chamber declared that the note was not unconstitutional. Thus, it can be clearly observed that the Chamber correctly understood the contents of President Rodriguez's note of 28 June 2000 vis-à-vis the extent of Costa Rica's navigational rights.

3.154 It may be noted that once again Nicaragua presents an inaccurate English translation, in this case of Resolution 2001-08239 of 14 August 2001 of Costa Rica's Constitutional Chamber which distorts the true extent of Costa Rica's rights on the San Juan. Nicaragua's English version of the Resolution stated that "Costa Rica holds the perpetual right to use its lower *banks* for commercial, revenue and security purposes" (emphasis added).[378] However, the original Spanish text uses the following wording: "*Costa Rica detenta sobre el cauce bajo de aquel, un derecho perpetuo de uso para fines comerciales, fiscales y de seguridad*" (emphasis added).[379] "Cauce" is to be translated as "course," not as "bank". Thus the correct English translation provides: "Costa Rica holds the perpetual right to use its lower course for commercial, revenue and security purposes."

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[375] Although Nicaragua referred to this as the "Fourth Constitutional Court", it is formally referred to as the "Constitutional Chamber" and informally referred to as the "Fourth Chamber" or "*Sala Cuarta.*"

[376] NCM, para. 6.1.19.

[377] NCM, Vol II, Annex 66, p. 236.

(e) The requests for permission to navigate made in 2006

3.155 On 19 June 2006, the Costa Rican Institute of Social Security requested permission to navigate on the San Juan in order to provide health care services to local communities. So did a Christian association which intended to carry out missionary work in some of those communities. The requests were accepted by way of "special" authorisations granted by the Nicaraguan authorities. In the event of breaches of Nicaraguan laws, the permits could be cancelled; and the Nicaraguan authorities could carry out routine inspections on the vessels. The grant of these authorisations was explained as a "gesture of friendship, good neighbourhood and courtesy of good faith [*sic*]". This explanation is indicative of Nicaragua's attitude in the matter, namely that, when the use of the waters of the San Juan is not specifically authorised by the 1858 Treaty and the Cleveland Award, there must be an authorisation. Nicaragua adds that Costa Rica accepted that state of affairs.[380]

3.156 These arguments are easily dismissed. First, the requests in question were made in June 2006, that is, nine months after the filing of the Costa Rican Application on 29 September 2005; they cannot, therefore, be taken into account. Second, one of the requesting entities was a private entity whose views or actions cannot be imputed to the State of Costa Rica. Third, regarding the first entity and its preoccupation with public health, there was simply no other way to perform its vital duties, as is explained in Dr. Thais Ching's Affidavit annexed to the present Reply.[381] This is discussed in more detail in Chapter 4.[382]

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[378] NCM, Vol II, Annex 66.

[379] NCM, Original Documents deposited within the Registry, Part III, Annex 66.

[380] NCM, paras. 5.2.12-6.2.16.

G. Conclusions

3.157 The following conclusions may be drawn as to the substance of the rights relied on by Costa Rica:

(1) A good faith interpretation, the ordinary meaning of the terms in their context –both internal and external – taking into account the object and purpose of the Treaty of Limits leads to the inexorable conclusion that the phrase "*con objetos de comercio*" means "for purposes of commerce" and not "with objects of trade".

(2) Subsequent agreements, subsequent practice and relevant rules of international law applicable to the dispute confirm this interpretation, as do the antecedents of the 1858 Treaty and the circumstances of its conclusion. The expressed and real intention of the parties – to which Nicaragua claims to attribute significance – was to include transport of "persons and property" and not exclusively merchandise.

(3) Costa Rica is entitled to navigate with public vessels manned by Costa Rican officials carrying their normal arms on that part of the San Juan where navigation is common, in exercise of its right of communication through the San Juan and in order to protect its freedom of navigation, to safeguard the River, to defend the boundary areas as well as the common Bay of San Juan del Norte.

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[381] Affidavit of Thais Ching Zamora, 8 August 2007: CRR, Annexes, Vol 2, Annex 55. In her testimony, Dr. Ching declares that "her job is not to make considerations of a legal character and that, given the imperative need to provide urgent services to the populations in order to safeguard the health and the lives of people, particularly of children and other social groups in risk in the area of the San Juan river, she wrote under the terms demanded by the Ambassador [of Nicaragua], all done as a result of the urgent state of necessity, given the … imminent sanitary risks". In this connection, one notes with interest that, in a letter addressed to Lic. Baldelomar, Cónsul of Nicaragua in Ciudad Quesada, Dr. Ching states that 50 per cent of the people taken care of by her Institute in the area of Puerto Viejo de Sarapiquí are from Nicaragua. This means that to provide health care to Nicaraguans in Costa Rican territory, the Costa Rican authorities have to request Nicaragua's permission. See Director, Costa Rican Social Security Fund, Health Area Puerto Viejo de Sarapiquí, Dr. Thais Ching Zamora, to First Cónsul, Nicaraguan Consulate, Ciudad Quesada, Licenciado Mario Rivas Baldelomar, Note No. 346-2006, 14 June 2006: CRR, Annexes, Vol 2, Annex 44.

[382] See below, paragraphs 4.26-4.30.

(4) Costa Rican vessels exercising the right of navigation are entitled to hoist the Costa Rican flag and cannot be obliged to hoist the Nicaraguan flag as a condition for that exercise.

(5) There is a consistent practice – recognised by Nicaragua – allowing the inhabitants of the right bank of the San Juan to fish for subsistence purposes, which has created a customary right to fish for these purposes.

(6) The conventional right to land on the Nicaraguan bank cannot be restricted by regulations which effectively deny the right of any practical effect.

(7) The 1956 Agreement imposes an autonomous obligation on Nicaragua to facilitate and to expedite traffic on the San Juan River.

(8) Any attempt by Nicaragua to deny Costa Rica's rights by considering them as subject to a simple "border courtesy" dependent on the goodwill of Nicaragua has no basis and must be rejected.

Table 1

Use of the term "*objetos*" as meaning "purposes" in 19th Century documents

Document	Reference	Description in Spanish	Description in English
1 Costa Rica-León Treaty (Montealegre-Solis), León, 9 September 1823	NCM Annex 2 English translation by Nicaragua	Artículo 2: "Que siendo el principal objeto de estos tratados la alianza y justa correspondencia….".	Article 2: "That the main object of these treaties being an alliance and reciprocity…"
2 Decree of the Central American Federation Congress regarding an inter Oceanic Canal through Nicaragua, Guatemala, 16 June 1825	CRR Annex 4 Source: *Compilación de Leyes no insertas en las Colecciones Oficiales, formada por el Lic Don Cleto González Víquez*, Tomo 1 (San José), pp. 411-413	"Que por varias casas y compañías de comercio extranjeras, se han hecho diferentes propuestas al Gobierno Supremo con el objeto de abrir un canal de navegación entre los dos mares Pacífico y Atlántico…"	"That several foreign trade houses and companies have made different proposals to the Supreme Government with the purpose of opening a navigational channel between both the Pacific and Atlantic oceans…"
	English translation by Costa Rica	Artículo 4: "El Gobierno deberá también contribuir a su más pronta y fácil ejecución; permitiendo el corte de maderas necesarias para la obra; auxiliando los reconocimientos, nivelaciones y demás operaciones que hayan de practicarse, haciendo franquear los planos y mapas relativos al objeto; y cooperando a su logro por todos los medios que no se opongan a la justicia ni al interés general, o al particular de los ciudadanos."	Article 4: "The Government shall also contribute to its fastest and easiest execution, allowing the felling of the woods necessary for the task; facilitating the surveys, levelling and other operations that should be practiced; clearing the plans and maps relating to this purpose; and cooperating for its achievement through any means that are not opposed to the justice nor the general interest, or that particular of the citizens."

Document	Reference	Description in Spanish	Description in English
3 Contract Between Nicaragua and the American Atlantic and Pacific Ship-Canal Company (Zepeda-Juarez-White), León, 27 August 1849	NCM Annex 14 (Preamble, Articles 18, 27 and Concluding Provision) English translation by Nicaragua CRR Annex 6 (Article 37) No translation of Article 37 having been provided by Nicaragua, English translation of Article 37 by Costa Rica. Source: NCM Annex 14.	Preamble: "El Director Supremo del Estado de Nicaragua y la "Compañía AMERICANA DEL CANAL MARÍTIMO ATLANTICO PACÍFICO"… deseando arreglar los términos de un contrato que facilite el tránsito por el istmo de Nicaragua, desde el Océano Atlántico al Pacífico, por medio de un canal marítimo, ó por un ferro-carril; han nombrado comisionados, por parte del Director Supremo del Estado de Nicaragua, á los Señores Licenciados Hermenegildo Zepeda y Gregorio Juarez, y por parte de la expresada Compañía al Sr. L. White, con plenos poderes para formar y concluir un contrato para los referidos objetos, cuyos comisionados, habiendo canjeado sus poderes, han ajustado y firmado los artículos siguientes.	Preamble: "The Supreme Director of the State of Nicaragua and the Atlantic-Pacific Maritime Canalization American Company… being desirous of concluding the terms of a contract that facilitates transit through the isthmus of Nicaragua, from the Atlantic to the Pacific Ocean, through a maritime canal or railroad, have resolved for that purpose to appoint Commissioners, to wit: The Supreme Director of the State of Nicaragua, Licentiates Hermenejildo Zepeda and Gregorio Juarez, and the aforementioned Company, Mr. David L. White, conferring upon them full powers to conclude and sign a contract for the aforesaid purpose, who, after exchanging their power, have agreed upon the following articles…"
		Artículo 18: "…Y al propio tiempo, con el objeto de llamar por esta ruta la más extensa concurrencia de los negocios…"	Article 18: "…At the same time, with the objective of drawing the broadest business to this route…"
		Artículo 27: "El Estado de Nicaragua, con el objeto de facilitar la colonización de las tierras contiguas al rio de San Juan…"	Article 27: "The State of Nicaragua, with the objective of facilitating the colonization of the land next to the San Juan River…"

Document	Reference	Description in Spanish	Description in English
		Artículo 37: "Queda finalmente estipulado que este contrato, y los derechos y privilegios que confiere se tendrán por inajenables por los individuos que componen la Compañía nominada en el presente y sus sócios; y que en ningún tiempo deberán transferirse ó asignarse en el todo ó en parte á cualquiera otra Compañía, y de ningún modo depender, ni tener coherencia con ninguna, sean los que fuesen sus objetos."	Article 37: "It is finally stipulated that this contract, as well as the rights and privileges it confers, will be considered as inalienable by the individuals that comprise the Company mentioned herewith and their partners, and that at no time shall they be transferred or assigned wholly or in part to any other Company, and in no way depend or be connected to any, whatever might be their purposes."
		Concluding provision: "El precedente contrato habiendo sido debidamente ratificado por la Lejislatura del Estado de Nicaragua; ahora por esta razón yo David L. White como Comisionado por parte de la Compañía americana del canal marítimo Atlántico Pacífico, investido de plenos poderes que se me confirieron con este objeto…	Concluding provision: "The present contract having been duly ratified by the Legislature of the State of Nicaragua, now, for this reason, I, David L. White, Commissioner on behalf of the U.S. company Atlantic Pacific Maritime Canal Company, vested with full powers conferred upon me by the parties for this purpose…"

Document	Reference	Description in Spanish	Description in English
4 United States-Nicaragua, General Treaty of Amity, Navigation, and Commerce, (Squier-Zepeda), Leon, 3 September 1849	CRR Annex 7 (Articles XXVI, XXXIII, XXXIV and XXXV) Source: *Unperfected Treaties of the United States of America 1776-1976, Vol 1 1776-1855*, pp. 280-302 Both the Spanish and English documents are authentic.	Artículo XXVI: "Siempre que una de las partes contratantes estuviere empeñada en guerra con otro estado, ningún ciudadano de la otra parte contratante aceptará comisión o patente de corso para el objeto de auciliar ó cooperar hostilmente con el dicho enemigo contra la mencionada parte que este en guerra, bajo la pena de ser tratado como pirata."	Article XXVI: "Whenever one of the contracting parties shall be engaged in war with another state, no citizen of the other contracting party shall accept a commission or letter marque for the purpose of assisting or co-operating hostilely with the said enemy against the said parties so at war, under the pain of being treated as a pirate."
		Artículo XXXIII: "Los dichos consules tendrán facultad para requerir el ancilio de las autoridades locales para la prision, detencion, y custodia de los desertores de buques, publicos o particulares, de su respectivo pais; y con este objeto se dirijirán a los tribunales, jueces y empleados competentes…"	Article XXXIII: "The said consuls shall have power to require the assistance of the authorities of the country for the arrest, detention, and custody of deserters from the public and private vessels of their country; and for that purpose they shall address themselves to the courts, judges, and officers competent…"
		Artículo XXXIV: "…Con el objeto de proteger mas eficazmente su comercio y navegación…."	Article XXXIV: "For the purpose of more effectually protecting their commerce and navigation…"

Document	Reference	Description in Spanish	Description in English
		Artículo XXXV: "... y se estipula también que todo producto, manufacturas, mercancías ú otras propiedades de licito comercio, pertenecientes a ciudadanos de los estados Unidos, que pasen de un océano al otro en ambas direcciones, con objeto de exportacion a paises extranjeros, no serán sujetos a derechos de importación o exportacion; ó que si ciudadanos de dichos estados habiendo introducido al estado de Nicaragua productos, manufacturas y mercancías con el objeto de venderlas ó cambiarlas"	Article XXXV: "...And it is also stipulated, that all lawful produce, manufactures, merchandise, or other property belonging to citizens of the United States passing from one ocean to the other, in either direction, for the purpose of exportation to foreign countries, shall not be subject to any import or export duties whatsoever; or if any citizens of the United States, having introduced such produce, manufactures, or merchandise into the State of Nicaragua, for sale or exchange..."
5 United States-Great Britain, Convention Concerning a Ship Canal Connecting the Atlantic and Pacific Oceans (Clayton-Bulwer), Washington, 19 April 1850 (in force 4 July 1850)	CRR Annex 8 (Preamble, Articles III and VIII) Sources: Spanish version: MM Peralta, *El Canal Interoceánico de Nicaragua y Costa Rica en 1620 y en 1887* (Bruselas: Imprenta de Ad. Mertens, 1887), pp. 68-71 English version: 104 CTS 41	Preamble: "SU MAJESTAD BRITANICA y los Estados Unidos de América deseando consolidar las relaciones de amistad que tan felizmente subsisten entre ellos, estableciendo y fijando en un convenio sus miras é intenciones referentes á cualesquiera medios de comunicación por canal navegable que pueda construirse entre los océanos Atlántico y Pacífico por la vía del río San	Preamble: "The United States of America and HER BRITANNIC MAJESTY, being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a Convention, their views and intentions which reference to any means of communication by Ship Canal, which may be constructed between the Atlantic and Pacific Oceans, by the

Document	Reference	Description in Spanish	Description in English
		Juan de Nicaragua y cualquiera ó ámbos de los lagos de Nicaragua ó Managua, á un puerto ó lugar del océano Pacífico; Su Majestad Británica ha conferido plenos poderes al Muy Honorable Sir Henry Lytton Bulwer… y el Presidente de los Estados Unidos á John M. Clayton, Secretario de Estado de los Estados Unidos, con el objeto expresado…"	way of the River San Juan de Nicaragua and either or both of the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean,- -The President of the United States has conferred full powers on John M. Clayton, Secretary of State of the United States; and HER BRITANNIC MAJESTY on the Right Honourable Sir Henry Lytton Bulwer….for the aforesaid purpose…"
		Artículo III: "…las personas empleadas en construirlo y su propiedad usada o que se use con tal objeto serán protegidas…"	Article III: "…the persons employed in making the said Canal and their property used, or to be used, for that object, shall be protected…"
		Artículo VIII: "Los Gobiernos de la Gran Bretaña y de los Estados Unidos, queriendo al celebrar esta convención, no solamente realizar un objeto particular…"	Article VIII: "The Governments of the United States and Great Britain having not only desired in entering into this Convention, to accomplish a particular object…

Document	Reference	Description in Spanish	Description in English
6 Costa Rica-United States Treaty of Friendship, Commerce and Navigation (Molina-Webster), Washington, 10 July 1851	CRR Annex 9 (Preamble, Articles II and XII) Spanish version: *Colección de los Tratados Internacionales Celebrados por la Republica de Costa Rica* (San José: Tipografía Nacional), 1893, Vol. I, pp. 65-72 English version: *Report of the Isthmian Canal Commission 1899-1901* (Washington: Government Printing Office, 1904) pp. 417-420	Preamble: "Habiendo tráfico comercial establecido, hace algún tiempo, entre la República de Costa Rica y los Estados Unidos, ha parecido conveniente para la seguridad como también el fomento de sus mutuos intereses, y para la conservación de la buena inteligencia entre la mencionada República y los Estados Unidos, que las relaciones que ahora existen entre ambas Partes, sean reconocidas y confirmadas formalmente por medio de un tratado de amistad, comercio y navegación. Con este objeto han sido nombrados los respectivos Plenipotenciarios…"	Preamble: "Commercial intercourse having been for some time established between the United States and the Republic of Costarica, it seems good for the security as well as the encouragement of such commercial intercourse, and for the maintenance of good understanding between the United States and the said republic, that the relations now subsisting between them, should be regularly acknowledged and confirmed by the signature of a Treaty of Amity, Commerce and Navigation. For this purpose they have named their respective Plenipotentiaries…"
		Artículo II: "…Los ciudadanos y súbditos de los dos países, respectivamente, tendrán libertad para… alquilar y ocupar casas y almacenes para los objetos de su comercio…"	Article II: "…The subjects and citizens of the two countries shall have liberty freely and securely to…. hire and occupy and occupy houses and ware houses for the purpose of their commerce…"
		Artículo XII: "…No serán inquietados, molestados ni perturbados en manera alguna, en razón de su creencia religiosa, ni en los ejercicios propios de su religión ya dentro de sus casas particulares, en los lugares de culto destinados para aquel objeto…"	Article XII: "…They shall not be disturbed, molested or annoyed in any manner on account of their religious belief, nor in the proper exercise of their religion, either within their own private houses or in the places of worship destined for that purpose…"

Document	Reference	Description in Spanish	Description in English
7 Chamorro-Mayorga-White Convention, Granada, 14 August 1851	NCM Annex 3 English translation by Nicaragua	Artículo 1: "…con el único objeto de facilitar la construcción del canal marítimo…"	Article 1: "…for the sole purpose of facilitating the construction of a maritime canal…"
		Artículo 3: "La compañía nuevamente creada procederá á ejecutar y á cumplir aquellos objetos de su competencia (…) Todos aquellos actos ú objetos que puedan constituir una infracción de los derechos…"	Article 3: "The newly created Company will proceed to execute and comply with those objectives under its competence (…) All those acts or objects that may infringe the rights of…"
		Artículo 5: "…proceder á todo aquello que sea mas conveniente para el estricto cumplimiento del objeto de su instituto en la parte que le corresponda…"	Article 5: "...carry out whatever is more convenient for the strict compliance of the company objective as indicated…"
		Artículo 6: "…y adoptará todas las providencias necesarias para el cumplimiento del objeto expresado en…."	Article 6: "…will determine and approve all the necessary resolutions leading to the achievement of the objective set forth in…"
		Artículo 7: "Todas las propiedades, cosas, acciones, derechos, créditos y electos de la nueva compañía sesan libres de cualquiera especie de carga, ó impuesto durante el tiempo de la concesion … para la construcción del canal marítimo y demas objetos."	Article 7: "All properties, objects, shares, rights, credits and effects of the new Company will be free of all charges or duties for the duration of the concession ….regarding the building of the maritime canal and other objects."

Document	Reference	Description in Spanish	Description in English
8 Irisarri-Stebbins Contract, New York, 19 June 1857	NCM Annex 15 English translation by Nicaragua	Artículo 2: "…Y con el objeto de averiguar… Artículo 3: "…Como el objeto y la intención de este artículo…"	Article 2: "…And for the purpose of accurately ascertaining…" Article 3: "…Given that the purpose and intent of this article…"
9 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), Washington DC, 16 November 1857	NCM Annex 5 (inaccurate English version) CRR Annex 10 (Articles II and XVI) Sources: English version: CL Wiktor, *Unperfected Treaties of the USA, Volume II 1856-1882*, pp. 135-143 Spanish version: US National Archives, Washington DC, Unperfected Treaty Series W-2	Artículo II: "Habrá recíproca libertad de comercio entre todos los territorios de la República de Nicaragua, y los territorios de los Estados Unidos. Los ciudadanos de los dos países, respectivamente, tendrán plena libertad de llegar franca y seguramente, con sus buques y cargamentos, á todos los lugares, puertos y ríos en los territorios mencionados, á los cuales se permita, ó se permitiere llegar á otros extranjeros, entrar en los mismos, y permanecer y residir en cualquiera parte de ellos, respectivamente, así como alquilar y ocupar casas y almacenes para objetos de comercio; en general, los comerciantes y traficantes de cada nación, respectivamente, gozarán de la más completa protección y seguridad para su comercio, sujetos siempre á las leyes y estatutos de los dos países respectivamente…."	Article II: "There shall be, between all the territories of the United States and the territories of the Republic of Nicaragua, a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have full liberty, freely and securely, to come, with their ships and cargoes, to all places, ports, and rivers, in the territories aforesaid, to which other foreigners are, or may be, permitted to come, to enter into the same, and to remain and reside in any part thereof, respectively; also, to hire and occupy houses and warehouses for the purpose of their commerce; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, subject always to the laws and statutes of the two countries respectively…."

Document	Reference	Description in Spanish	Description in English
		Artículo XVI: "…si fuese necesario en cualquier tiempo emplear fuerza militar para la seguridad y protección de las personas y propiedades que pasen por cualquiera de las vías mencionadas, empleará la fuerza necesaria con tal objeto…puede emplear tal fuerza para este objeto, con exclusión de cualquier otro…"	Article XVI: "…should it become necessary at any time to employ military force for the security and protection of persons and property passing over any of the routes aforesaid, it will employ the requisite force for that purpose…employ such force, for this and for no other purpose…"
10 Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez), San José, 15 April 1858	CRM Annex 7	Artículo 6 (Original Spanish version): "…pero la República de Costa Rica tendrá en dichas aguas, los derechos perpetuos de libre navegacion, desde la espresada desembocadura hasta tres millas inglesas ántes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica, por los rios de San Cárlos ó Sarapiquí, ó cualquiera otra via procedente de la parte que en la ribera del San Juan se establece corresponder á esta República…"	Article VI (Costa Rican translation submitted to Cleveland): "…but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica..."

Document	Reference	Description in Spanish	Description in English
			Article VI (Nicaraguan translation submitted to Cleveland): "…but the Republic of Costa Rica shall have perpetual rights, in the said waters, of free navigation from the river's mouth to three English miles below Castillo Viejo for the purposes of commerce, whether with Nicaragua or the interior of Costa Rica, by way of the rivers San Cárlos or Sarapiqui or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic…".
		Artículo VIII (original Spanish version): "Si los contratos de canalización o de tránsito celebrados antes de tener el Gobierno de Nicaragua, conocimiento de este convenio, llegasen a quedar insubsistentes por cualquier causa, Nicaragua se compromete a no concluir otro sobre los expresados objetos…."	Article VIII (Costa Rican translation submitted to Cleveland): "If the contracts of canalization or transit entered into by the Government of Nicaragua previous to its being informed of the conclusion of this treaty should happen to be invalidated for any reason whatever, Nicaragua binds herself not to enter into any other arrangement for the aforesaid purposes…"

Document	Reference	Description in Spanish	Description in English
			Article VIII (Nicaraguan translation submitted to Cleveland): "If the contracts for a canal or a transit made before Nicaragua's knowledge of this agreement should become incapable of duration through whatever cause, Nicaragua binds herself not to conclude any other for the said objects…"
11 Costa Rica-Nicaragua Treaty of Peace, Friendship, Alliance and Commerce (Mora-Martínez), Rivas, 30 April 1858	CRR Annex 11 (Preamble) Source: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909) English translation by Costa Rica	Preamble: "Nos, Juan Rafael Mora, Presidente de la República de Costa Rica, y Tomás Martínez, Presidente de la República de Nicaragua… deseosos de cimentar, bajo bases sólidas de justicia y reciprocidad, relaciones de vecindad, de amistad, de alianza y de comercio, que consoliden los sentimientos de fraternidad… hemos creído muy provechoso á los respectivos pueblos concluir un Tratado que asegure el logro de tan importantes objetos…"	Preamble: "We, Juan Rafael Mora, President of the Republic of Costa Rica, and Tomás Martínez, President of the Republic of Nicaragua… willing to establish, over solid bases of justice and reciprocity, relations of neighbourliness, friendship, alliance and commerce, that consolidate the sentiments of fraternity…have considered of benefit to our respective peoples to conclude a Treaty that assures the achievement of such important purposes…"

Document	Reference	Description in Spanish	Description in English
12 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Lamar-Zeledón), Managua, 16 March 1859	CRR, Annex 13 (Preamble, Article II) English version: CL Wiktor, *Unperfected Treaties of the USA, Volume II 1856-1882*, pp. 157-166 Spanish version: US National Archives, Washington DC, Unperfected Treaty Series X-2	Preamble: "Los infraescritos Pedro Zeledón , Secretario de Relaciones Exteriores de la República de Nicaraga y Mirabeau B. Lamar, Ministro Residente de los Estados Unidos de América cerca de la misma República, con el objeto de que sean mantenidas las amistosas relaciones entre sus respectivos países…"	Preamble: "The undersigned, Mirabeau B. Lamar, minister resident of the United Status of America to the republic of Nicaragua, and Pedro Zeledón, secretary of foreign relations of said republic, in order that the most friendly relations may be maintained between their respective countries…."
		Artículo II: "Habrá recíproca libertad de comercio entre todos los territorios de la República de Nicaragua y los territorios de los Estados Unidos. Los ciudadanos de los dos países, respectivamente, tendránplenalibertad de llegar franca y seguramente, con sus buques y cargamentos á todos los lugares, puertos y ríos en los territorios mencionados, á los cuales se permita, ó se permitiere llegar á otros extranjeros; de entrar en los mismos, y permanecer y residir en cualquier parte de ellos, respectivamente; así como alquilar y ocupar casas y almacenes para los objetos de su comercio; y en general los comerciantes y traficantes de cada Nación, respectivamente, gozarán de la más completa protección y seguridad para su comercio, sujetos siempre á las leyes y estatutos de los dos países respectivamente…."	Article II: "There shall be between all the territories of the United States and the territories of the Republic of Nicaragua a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have full liberty freely and securely to come with their ships and cargoes to all places, ports, and rivers in the territories aforesaid to which other foreigners are or may be permitted to come, to enter into the same, and to remain and reside in any part thereof, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, subject always to the laws and statutes of the two countries respectively..."

Document	Reference	Description in Spanish	Description in English
13 Great Britain-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lennox Wyke-Zeledon), Managua, 11 February 1860	CRR Annex 15 (Preamble, Article XVII) Source: 121 CTS 364 Both the Spanish and English versions are authentic.	Preamble: "Su Majestad la Reina del Reino Unidos de la Gran bretaña é Irlanda, y la República de Nicaragua, deseosas de mantener y mejorar las relaciones de buena inteligencia que felizmente existen entre ellas, y de promover el comercio entre sus respectivos subditos y ciudadanos, han juzgado conveniente concluir un Tratado de Amistad, Comercio y Navegación, y con ese objeto nombrado comos sus Plenipotenciarios, a saber…."	Preamble: "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the Republic of Nicaragua, being desirous to maintain and improve the relations of good understanding which happily subsist between then, and to promote the commercial intercourse between their respective subjects and citizens, have deemed it expedient to conclude a Treaty of Friendship, Commerce, and Navigation, and have for that purpose named as their respective Plenipotentiaries, that is to say…"
		Artículo XVII: "…ó en las capilla ó lugares de adoración designados con ese objeto,…	Article XVII: "…or in the chapels or places of worship appointed for that purpose, …
14 Zeledón-Rosa Contract, Managua, 30 December 1860	NCM Annex 17 Articles I and V English translation by Nicaragua. As no English translation of Articles VII and XVII was provided by Nicaragua, English translation by Costa Rica.	Artículo I: "…lleven a cumplido efecto los objetos del presente contrato…"	Article I: "…they may carry out the objectives of the present contract…"
		Artículo V: "Siendo, como es, el objeto esencial del presente contrato…"	Article V: "The essential object of the present contract being as it is…"
		Artículo VII: "…durante la continuación del presente contrato, y para los objetos del mismo…"	Article VII: "…during the continuation of this contract and for its object …"
		Artículo XVII: "Con el objeto de favorecer la ejecución y el buen éxito de…"	Article XVII: "With the purpose of favouring the execution and good success of…"

Document	Reference	Description in Spanish	Description in English
15 Nicaragua-Central American Transit Company Inter-Oceanic Transit Contract (Molina-Morris), Washington, 10 November 1863	NCM Annex 18 CRR Annex 16 (Articles VII and XIX) An inaccurate English translation of Article VII having been provided by Nicaragua, Costa Rica has provided an English translation. Source: NCM Annex 18	Artículo VII: "…limitándose espresamente dicho privilegio esclusivo de navegación a los objetos de la sola vía de Tránsito Interoceánico por el presente concedida…"	Article VII: "…being said exclusive privilege of navigation expressly limited to the sole inter-oceanic transit route granted hereunder…" [Translation by Nicaragua] Article VII: "…being said exclusive privilege of navigation expressly limited to the purposes of the sole inter-oceanic transit route granted hereunder…" [Translation by Costa Rica]
		Artículo XIX: "El Gobierno garantiza a la Compañía que en la ejecución de las obras que por el presente toma sobre sí, cuyas obras son uno de los principales objetos de este contrato…"	Article XIX: "The Government guarantees the Company that in the execution of the works that it herewith accepts, which works are one of the main purposes of this contract…"
16 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson), Managua, 21 June 1867	CRR, Annex 17 (Preamble, Articles II, IX and XVI)	Preamble: "La República de Nicaragua y los Estados Unidos de América, deseando conservar y mejorar la buena inteligencia y amigables relaciones	Preamble: "The United States of America and the republic of Nicaragua desiring to maintain and to improve the good understanding and the

Document	Reference	Description in Spanish	Description in English
	Source: GP Sanger, *The Statutes at Large, Treaties and Proclamations of the United States of America from December 1867, to March 1869, Vol XV* (Boston: Little, Brown, and Co., 1869), pp. 549-562 Both the Spanish and English versions are authentic.	que ahora felismente existen entre ellos, promover el comercio de sus ciudadanos y hacer algunos arreglos recíprocos respecto de la comunicación entre los oceanos Atlantico y Pacifico por el Rio San Juan, y cada uno ó ambos, los Lagos de Nicaragua ó de Managua, ó por cualquiera otra ruta al traves del territorio de Nicaragua; con tal objeto han convenido en concluir un tratado de...."	friendly relations which now happily exist between them, to promote the commerce of their citizens, and to make some mutual arrangement with respect to a communication between the Atlantic and Pacific oceans, by the river San Juan, and either or both the lakes of Nicaragua and Managua, or by any other route through the territories of Nicaragua, have agreed for this purpose to conclude a treaty of...."
		Artículo II: "Los ciudadanos de los dos países...tendrán plena libertad de ....alquilar y ocupar casas y almacenes para objetos de su comercio..."	Article II: "...The subjects and citizens of the two countries...are, or may be, permitted to ... to hire and occupy houses and warehouses for the purpose of their commerce..."
		Artículo IX: "...Ni será tomada la propiedad de ninguno de ellos, de cualquiera especie, para ningun objeto publico..."	Article IX: "...Nor shall the property of either, of any kind, be taken for any public object..."

Document	Reference	Description in Spanish	Description in English
		Artículo XVI: "La republica de Nicaragua conviene en que si en cualquier tiempo fuese necesario emplear fuerzas militares para la seguridad y protección de las personas y propiedades que pasan sobre cualquiera de las antedichas rutas, empleara la fuerza requerida para tal proposito; pero si dejase de hacerlo por cualquiera de las antedichas rutas, empleara la fuerza requerida para tal proposito, pero si dejase de hacerlo por cualquier causa, el gobierno de los Estados Unidos puede…emplear tal fuerza, para este, y no para otro objeto…"	Article XVI: "The republic of Nicaragua agrees that, should it become necessary at any time to employ military forces for the security and protection of persons and property passing over any of the routes aforesaid, it will employ the requisite force for that purpose; but upon failure to do this from any cause whatever, the government of the United States may…employ such force for this and no other purpose…"
17 Costa Rica-Nicaragua, Preliminary Convention on a Scientific Survey (Volio-Zelaya), San José, 13 July 1868	CRM Annex 9 NCM Annex 6 Article 1 English translation by both Costa Rica and Nicaragua. Article 2 English translation by Nicaragua.	Artículo 1: "Se practicará un reconocimiento científico del río Colorado y del San Juan…con el objeto de examinar…"	Costa Rican translation: Article 1: "A scientific analysis of the Colorado and San Juan rivers shall be performed…for the purpose of examining…" Nicaraguan translation: Article I: "A scientific survey will be carried out in the Colorado and San Juan rivers…with the objective of determining…"

Document	Reference	Description in Spanish	Description in English
		Artículo 2: "La comisión levantará los planos y presupuestos necesarios, y hará extensivo su informe á todos los demás puntos que juzgue convenientes al objeto de su importante misión…"	Article 2: "The Commission will draw up the necessary plans and budgets and will extend its report to any other points it may deem convenient so as to accomplish its important mission…"
18 Costa Rica-Nicaragua, Treaty of Peace and Friendship (Volio-Zelaya), San José, 30 July 1868	CRR Annex 18 (Preamble) Spanish version: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909) English version: 137 CTS 478-482	Preamble: "La República de Nicaragua, por una parte, y la de Costa Rica por otra, animadas del deseo de estrechar y perpetuar las relaciones de amistad en que felizmente se encuentran, han resuelto celebrar un Tratado que produzca tales efectos. Con este objeto…"	Preamble: "The Republic of Nicaragua on the one side and the Republic of Costa Rica on the other, animated by the desire to render close and permanent the friendly relations at present existing between them, have resolved to conclude a Treaty to that effect. For this purpose…"
19 Costa Rica-Nicaragua, Treaty of Commerce (Volio-Zelaya), San José, 14 August 1868	CRM Annex 10 English translation by Costa Rica.	"Creyendo conveniente los Gobiernos de las Repúblicas de Nicaragua y Costa Rica, para el fomento de sus mútuos intereses, destruír los obstáculos que impiden el ensanche y progreso del comercio de ambas Naciones; y convencidos de que un Tratado mercantil, que asegure ventajas recíprocas, es el medio de hacer más estrechas é íntimas las relaciones fraternales entre ambos pueblos, han conferido con este objeto sus Plenos Poderes…"	"The Governments of the Republics of Costa Rica and Nicaragua, deeming it convenient for the impulse of their mutual interests to destroy the obstacles that impede the widening and progress of the trade of both nations, and being convinced that a commercial treaty that assures reciprocal advantages is the way to tighten and to make even more intimate the fraternal relations between both peoples, have with this objective granted full powers…"

Document	Reference	Description in Spanish	Description in English
20 Costa Rica-Nicaragua, Treaty for the excavation of an Inter-oceanic Canal (Jiménez-Montealegre) San Jose, 18 June 1869	CRM Annex 13 (Article 1) NCM Annex 8 (Articles 1, 2, 3, 12, 43, 44 and 45) CRR Annex 19 (Articles 15, 19 and 23) Article 12 English translation by Nicaragua Articles 15, 19 and 23: As Nicaragua did not provide an English translation, English translation from (1870-1871) LXI *BFSP* 1144-1151	Artículo 12: "…La República de Costa Rica podrá abrir esos caminos aún en territorio de Nicaragua y navegar los ríos pertenecientes al mismo territorio con el objeto de dar salida…." Artículo 15: "Se prohibe al concesionario introducir al territorio de la República, cualquiera mercancía, con el objeto de venderla ó cambiarla…." Artículo 19: "…uno ó más buques de guerra al puerto en que sean necesarios con el objeto de proteger las personas y propiedades…" Artículo 23: "El concesionario podrá establecer carreteras, caminos de hierro de servicio, y canales de la misma naturaleza, con el objeto especial de la construcción del canal marítimo…"	Article XII: "…The Republic of Costa Rica may open such roads even in Nicaraguan territory and navigate on the rivers in that territory, for the purpose of transporting…" Article XV: "The contractor is prohibited from importing into the territory of the Republic, any merchandise for the purpose of sale or barter..." Article XIX: "…one or more ships of war to the port where they may be required for the purpose of protecting the persons and property…" Article XXIII: "The contractor may lay down roads, railways for service, and canals of the same nature, for the special purpose of constructing the maritime canal…"

Document	Reference	Description in Spanish	Description in English
21 Costa Rica-Nicaragua, Treaty of Limits (Navas-Castro), San José, 19 January 1884	NCM Annex 10 English translation by Nicaragua	Artículo VII: "En general, los derechos que Costa Rica adquiera por este Tratado, no embarazan de ninguna manera la libre acción de Nicaragua, para celebrar nuevas contratas con el objeto de canalizar el Istmo…"	Article VII: "In general, the rights acquired by Costa Rica by virtue of this Treaty do not restrict in any way the freedom of Nicaragua to enter into new contracts for the purpose of building the Isthmus canal…"
22 Costa Rica-Nicaragua, Canalization Convention (Navas-Castro), San José, 19 January 1884	CRR Annex 21 (Preamble) Source: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 403-405 English translation by Costa Rica	Preamble: "CONSIDERANDO: Que la construcción del Canal Interoceánico por Nicaragua es de interés general para Centro América y especialmente para ambos países, animadas del deseo de facilitar la pronta realización de la obra, han resuelto celebrar una Convención con tal objeto."	Preamble: "CONSIDERING: That the construction of the Inter-oceanic Canal through Nicaragua is of general interest for Central America, and in particular for both countries, moved by the desire to facilitate the prompt accomplishment of the task, have decided to celebrate a Convention for such purpose."
23 Costa Rica-Nicaragua, Treaty of Peace, Friendship, Commerce and Extradition (Navas-Castro), San José, 19 January 1884	CRR Annex 22 (Preamble) Source: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 455-466 English translation by Costa Rica	Preamble: "El Presidente de la República de Nicaragua y el Presidente de la República de Costa Rica, deseosos de estrechar tanto como es posible las relaciones de ambos países, y de servir á sus comunes intereses, por medio de un Tratado de Paz, Amistad, Comercio y Extradición, han convenido en abrir negociaciones para este objeto…"	Preamble: "The President of the Republic of Nicaragua and the President of the Republic of Costa Rica, desirous of strengthening as much as possible the relations between both countries and to serve to their common interests by means of a Friendship, Trade, and Extradition Treaty, have agreed to start negotiations towards this purpose…"

Document	Reference	Description in Spanish	Description in English
24 United States of America-Nicaragua, Treaty providing for the construction of an Inter-Oceanic Canal across the territory of Nicaragua (Frelinghuysen-Zavala), Washington, 1 December 1884	CRR Annex 23 (Preamble, Articles IV, V, VIII and XIII) Sources: English version: *Report of the Isthmian Canal Commission, 1899-1901*, Appendix L, pp. 359-363 Spanish version: *Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica* (San José: Imprenta Nacional, 1884-1885)	Preamble: "Los Estados Unidos de América y la República de Nicaragua…han decidido construir un canal con este objeto…"	Preamble: "The United States of America and the Republic of Nicaragua…have agreed for this purpose to build a canal…"
		Artículo IV: "Con el objeto de llevar a cabo este convenio…" (…) para los depósitos de aguas, diques, muelles, arsenales, accesorios de las esclusas, faros, señales, almacenes, talleres, edificios y para cualesquiera otros objetos necesarios…"	Article IV: "For the purpose of carrying out this agreement…for reservoirs, dykes, piers, docks, spaces about locks, for lights, beacons, storehouses, machine shops, buildings, and for whatever other thing necessary…"
		Artículo V: "La obra será declarada de utilidad pública y para el objeto de construir y llevar a cabo el canal…"	Article V: "The work shall be declared one of public utility, and for the purposes of building and operating the canal…"
		Artículo VIII: "…siendo el objeto de este convenio que dichos buques, sus cargamentos…"	Article VIII: "…being the intent of this agreement that vessels, their cargoes…"
		Artículo XIII: "…por cuanto el objeto de este convenio es…."	Article XIII: "…it being the intent of this agreement…"

Document	Reference	Description in Spanish	Description in English
25 Costa Rica-Nicaragua Treaty of Peace, Commerce and Extradition (Esquivel-Chamorro), San José, 9 October 1885	CRR Annex 24 (Preamble) Source: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909) English translation by Costa Rica	Preamble: "El Presidente de la República de Nicaragua y el Presidente de la República de Costa Rica, deseosos de estrechar tanto como sea posible las relaciones de ambos países y de servir a sus comunes intereses por medio de un Tratado de Paz, Amistad, Comercio y Extradición, han convenido en abrir negociaciones para este objeto…"	Preamble: "The President of the Republic of Nicaragua and the President of the Republic of Costa Rica, desirous of strengthening as much as possible the relations between both countries and to serve to their common interests by means of a Peace, Friendship, Commerce, and Extradition Treaty, have agreed to start negotiations towards this purpose…"
26 Contract between the Government of the Republic of Nicaragua and the Nicaragua Canal Association of New York for the opening of an inter-oceanic canal (Cárdenas-Menocal), Managua, 23 March 1887	NCM Annex 20 (Articles 6 and 46) CRR Annex 25 (Articles 7, 13, 16 and 30) Articles 6 and 46: English translation by Nicaragua Articles 7, 13, 16 and 30: English translation from *Report of the Isthmian Canal Commission 1899-1901* (Washington: Government Printing Office, 1904), pp. 389-400	Artículo 6: "…Nicaragua procurará obtener de la Potencias que garanticen la neutralidad, que en las convenciones que se celebren con tal objeto, se comprometan á garantizar también una zona de tierra paralela al Canal…"	Article VI: "…Nicaragua will endeavors (sic) to obtain from the powers that are to guarantee the neutrally (sic) that in the treaties that shall be made for that purpose they shall agree also to guarantee zone of lands parallel to the canal …"

Document	Reference	Description in Spanish	Description in English
		Artículo 7: "La presente convención, con todas sus cargas y ventajas, será objeto de una Compañía de ejecución, conforme a los artículos 1° y 10 y siguientes…."	Article VII: "This present agreement, with all its charges and advantages, shall be the object of a company of execution in agreement with Articles I, X and those following thereafter…."
		Artículo 13: "…Bien entendido que esta obligación no compromete de ningún modo á la Compañía á poner ni a conservar en estado navegable para pequeñas embarcaciones, la parte baja del río que esas exclusas tengan por objeto poner en comunicación con el Canal."	Article XIII: "…It is understood that this duty does not in any manner compel the company to place or maintain, in navigable condition for small craft, the lower part of the river which these locks may be intended to place in communication with the canal.
		Artículo 16: "… Podrá escoger con tal objeto, en las costas de los dos océanos, dentro del territorio de Nicaragua, las localidades que los estudios hechos hayan señalado como preferibles."	Article XVI: "…It may, for this purpose, select on the coasts of the two oceans, within the territory of Nicaragua, the localities which the surveys made indicate as preferable.

Document	Reference	Description in Spanish	Description in English
		Artículo 30: "La Compañía no podrá introducir al territorio de la República, mercancías con el objeto de traficar con ellas, si no fuere pagando los derechos de aduana establecidos por ley…." Artículo 46: "…Y se estipula igualmente que la Compañía se obliga a pagar al Gobierno de la República todo cuanto de aquí en adelante invierta, en cualquier concepto, con el objeto de mejorar la navegación del Río y puerto de San Juan del Norte…."	Article XXX: "The company shall not import merchandise into the territory of the Republic, for the purpose of trafficking, without paying the import duties established by law...." Article XLVI: "It is also stipulated that the company binds itself to pay government (sic) of the republic all it may from now on expend in any way for the improvement of the navigation of the river and the port of San Juan del Norte…"
27 Costa Rica-Nicaragua, Convention (Soto-Carazo), Managua, 26 July 1887	CRM Annex 15 English translation by Costa Rica	Artículo II: "Para hacer navegable el río San Juan en toda estación del año, el Gobierno de Costa Rica consiente en que se tomen del río Colorado las aguas que se necesiten, para echarlas en aquel río, y en que se practiquen con tal objeto las obras convenientes."	Article II: "In order to make the San Juan River navigable all year round, the Government of Costa Rica agrees that the waters required for this be taken from the Colorado River, in order to deposit them in the former and that the appropriate works be carried out for this purpose.

Document	Reference	Description in Spanish	Description in English
28 Cleveland Award upon the validity of the Treaty of Limits of 1858 between Costa Rica and Nicaragua, Washington DC, 22 March 1888	CRM Annex 16 CRR Annex 26 (Second Article and Third Article point 5) Original award is in English; Spanish version : *Memoria Anual de la Secretaría de Relaciones Exteriores y Carteras Anexas 1888* (San José: Imprenta Nacional, 1888)	Segundo: "La República de Costa Rica, no tiene según dicho Tratado, y conforme a las estipulaciones de su artículo sexto, el derecho de navegar el río San Juan con buques de guerra; pero puede hacerlo con embarcaciones del servicio fiscal, según corresponda y tenga que ver con el goce de los "objetos de comercio", que se le reconoce por dicho artículo, o como se necesite para la protección de dicho goce." "V.- La República de Costa Rica no está obligada a contribuir en proporción alguna a los gastos que la República de Nicaragua tenga que hacer para cualquiera de los objetos arriba mencionados."	"*Second.* The Republic of Costa Rica under said Treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the "purposes of commerce" accorded to her in said article, or as may be necessary to the protection of said enjoyment." "5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned."

Document	Reference	Description in Spanish	Description in English
29 Contract between the Government of the Republic of Costa Rica and the Nicaragua Canal Association for the opening of an inter-oceanic canal (Pérez-Menocal), San José, 31 July 1888	CRR Annex 27 (Preamble, Articles VI, VII, XXVI and XLV) Spanish version: Archivo Nacional de Costa Rica English version: AR Colquhoun, *The Key of the Pacific: The Nicaragua Canal* (Westminster: Archibald Constable & Co., 1895), pp. 386-407	Preamble: "…autorizado especialmente por … para celebrar ad-referendum el presente contrato…y ….. autorizado también para el dicho objeto, …"	Preamble: "…especially authorized by ….to celebrate ad referendum the present contract…and …with full powers from it, and also authorized for this purpose …"
		Artículo VI: "… Costa Rica procurará obtener de las Potencias que garanticen la neutralidad, el que en las convenciones que se celebren con tal objeto, se comprometan también a garantizar con el mismo carácter una zona de tierra paralela al Canal…."	Article VI: "…Costa Rica shall endeavour to obtain from the powers that are to guarantee the neutrality, that in the treaties to be made for that purpose, they shall also bind themselves to guarantee the same conditions to a zone of land parallel to the canal…"
		Artículo VII: "La presente concesión sólo será transmisible á la Compañía ó Compañías que se organicen con el objeto de construir ó explotar el Canal…Se invitará a todas las naciones para la formación del capital necesario á esta Empresa, y con tal objeto será bastante la publicación de un anuncio durante veinte días consecutivos…."	Article VII: "The present concession shall be transferable only to such company or companies as may be organized for the purpose of constructing or operating the canal… The people of all nations shall be invited to contribute the necessary capital to the enterprise, and it shall be sufficient for the fulfillment of this requirement to publish an advertisement for twenty consecutive days…"

Document	Reference	Description in Spanish	Description in English
		Artículo XXVI: "La Asociación no podrá introducir en el territorio de la República mercancías con el objeto de traficar con ellas, sino fuere pagando los derechos de aduana establecidos por ley..."	Article XXVI: "The association cannot import merchandise into the territory of the Republic for the purposes of trafficking with it without paying the custom duties established by law…"
		Artículo XLV: "…Las acciones á que se refiere este artículo se entregarán al Agente que nombre el Gobiernos con este objeto, tan pronto como la compañía esté lista para emitir los certificados de su capital."	Article XLV: "…The shares to which this Article refers shall be delivered to the agent appointed by the government for this purpose as soon as the company may be ready to issue certificates of its capital."
30 Costa Rica-Nicaragua, Treaty of Limits (Guerra-Castro), Managua, 23 December 1890	NCM Annex 12 English translation by Nicaragua	Artículo VI: "…El expresado derecho de uso tiene por objeto el transporte, embarque y desembarque de toda clase de mercaderías, sin restricción ninguna, la construcción de ferrocarriles y muelles; la fundación de oficinas, establecimientos comerciales y casas de habitación, las cuales, así como las personas que habiten dicha faja de terreno, estarán sometidos á la jurisdicción y leyes de Costa Rica. …"	Article VI: "…The purpose of the aforesaid right of use is to transport, load and unload all kinds of merchandise, without restriction, build railways and wharves; establish offices, commercial stores and residential houses, which shall be subject, as well as the persons who inhabit this tract of land, to the jurisdiction and laws of Costa Rica. …"

Document	Reference	Description in Spanish	Description in English
31 Costa Rica-Nicaragua, Delimitation Convention (Pacheco-Matus), San Salvador, 27 March 1896	CRM Annex 17 English translation: 182 CTS 359 Spanish version: National Archive, San José	Artículo 1: "Los Gobiernos contratantes se obligan a nombrar cada uno una Comisión compuesta de dos ingenieros o agrimensores con el objeto de trazar y amojonar debidamente la línea divisoria entre las Repúblicas de Nicaragua y Costa Rica…."	Article I: "The contracting Governments bind themselves to each name a commission composed of two engineers or surveyors for the purpose of properly tracing and marking the boundary line between the Republics of Costa Rica and Nicaragua…"

Table 2

Terms used to refer to articles of trade, goods, things, etc. in 19th Century documents

Document	Reference	Description in Spanish	Description in English
1 Instructions for Francisco Oreamuno to negotiate a treaty with Nicaragua, San José, 26 July 1838	NCM Annex 87 English translation by Nicaragua	Artículo 17: "Estipulará la libertad de Costa Rica de navegar por el río de San Juan y la libertad de los derechos de exportación por el mismo río de sus frutos, puesto que tiene habilitado en su territorio el río de Sarapiquí, cuyas aguas aumentan el caudal del río San Juan. Si fuese necesario comprenderá en esta estipulación la prohibición de introducir efectos o mercancías extranjeras a Costa Rica por aquella vía, en caso de no poderse conseguir que las introducciones se hagan registradas para pagar los derechos en las aduanas de este Estado: y puede convenirse en una quinta, cuarta y tercera parte del rendimiento líquido anual a favor de Nicaragua, siempre que las exportaciones se hagan libremente."	Article 17: "He will set down Costa Rica's freedom to navigate on the San Juan River and its freedom from export duties on its fruits leaving through the same river, since its territory contains the Sarapiquí River, the water of which increases the San Juan River flow. If necessary, this covenant shall include the prohibition of introducing foreign goods or merchandise to Costa Rica through the same waterway, in case entered goods could not be registered to pay duties at this State customs: and fifth, fourth, or third of the annual liquid returns in favor of Nicaragua may be agreed upon, provided exports are done freely"
2 Contract Between Nicaragua and the American Atlantic and Pacific Ship-Canal Company (Zepeda-Juarez-White), León, 27 August 1849	NCM Annex 14 CRR Annex 6 (Articles 12, 14 and 21) English translation of Articles 17, 18 and 36 by Nicaragua.	Artículo 12: "…el Estado , por el presente, da á la Compañía el derecho de tomar y hacer uso de las porciones de terrenos baldíos que necesite para el establecimiento ó la erección de casas, almacenes, diques, muelles, estaciones, ó cualesquiera otros objetos útiles que tengan relación con las obras del canal."	Article 12: "…the State, through the present, grants the Company the right to take and use the portions of the empty lots that it may need for establishing or building houses, warehouses, dikes, docks, stations or any other useful objects that may have relation with the canal works"
	As Nicaragua did not provide an English translation of Articles 12, 14 and 21, English translation by Costa Rica. Source: NCM Annex 14	Artículo 14: "Todos los artículos que la Compañía necesite, tanto para los reconocimientos, exploración y construcción, como para el uso de las obras del canal, como máquinas, instrumentos, herramientas etc. y cualesquiera otros materiales necesarios…Pero la Compañía no tendrá derecho	Article 14: "All the articles that the Company may need, for the surveys, exploration and construction, as well as for the use of the canal works such as machinery, instruments, tools, etc. and any other materials needed…But the Company will not have

Document	Reference	Description in Spanish	Description in English
		de introducir dentro del territorio del Estado ningunos jéneros, mercancías ó cualesquiera otros artículos para vender ó cambiar, sin pagar los derechos establecidos por la ley; y asimismo, les es prohibido importar cualesquiera artículos, ó materiales que estuvieren estancados ó prohibidos por el Estado…"	the right to introduce within the State's territory any goods, merchandise or any other articles to sell or trade without paying the taxes established by law, and likewise, it is forbidden to import any articles or materials which may be the State's monopoly or forbidden by the State…"
		Artículo 17: "La Compañía conviene en transportar por el canal los pasajeros, y los efectos, mercancías y materiales de toda descripción que se le confíen…"	Article 17: "The Company agrees to transport through the Canal all passengers, stock, merchandise and materials of any description that are entrusted to it…"
		Artículo 18: "La Compañía establecerá una tarifa de derechos ó impuestos (fees or tolls) para el transporte de todo pasajero, jéneros, mercancías y propiedad de toda descripción…"	Article 18: "The Company shall establish fees or tolls for the transport of passengers, goods, merchandise and property of any description…"
		Artículo 21: "Por el presente, el Estado estipula, que todos los buques y vapores de la Compañía, como también todos los jéneros, mercancías, artículos manufacturados, ú otra propiedad cualquiera…"	Article 21: "By the present, the State stipulates that all the Company's vessels and steamers, as well as the goods, merchandise, manufactured articles or any other property…"
		Artículo 36: "Queda expresamente estipulado por el Estado de Nicaragua que será permitido á los buques, productos, artículos manufacturados, y á los ciudadanos de todas las naciones…"	Article 36: "It is expressly stipulated by the State of Nicaragua that all vessels, products, manufactured goods and citizens of all nationalities…"

Document	Reference	Description in Spanish	Description in English
3 United States-Nicaragua, General Treaty of Amity, Navigation, and Commerce (Squier-Zepeda), León, 3 September 1849	CRR, Annex 7 (Articles IV, V, VI, VII, VIII and XXXV) Source: CL Wiktor, *Unperfected Treaties of the United States of America 1776-1976, Vol 1 1776-1855*, pp. 280-302 Both the Spanish and English versions are authentic.	Artículo IV: "Igualmente conviene una y otra en que cualquiera especie de producciones, manufacturas ó mercaderías estrangeras que puedan ser en cualquier tiempo legalmente importadas en la republica de Nicaragua en sus propios buques, puedan ser también importadas en buques de los Estados Unidos…" Artículo V: No se impondran otros ó mas altos derechos sobre la importación en la republica de Nicaragua de cualquiera articulos del producto natural ó manufacturado de los estados Unidos, y no se impondrá otros ó mas altos derechos sobre la importación en los Estados Unidos de cualesquiera articulos del producto natural ó manufacturado de la republica de Nicaragua, que los que se exijan ó exijieren por iguales articulos del producto natural o manufacturado de cualquier otro pais estrangero; ni se impendran otros ó mas altos derechos ó gravámenes en ninguno de los dos paises sobre la esportacion de cualesquiera articulos para la republica de nicaragua, ó para los Estados Unidos respectivamente, que los que deban exijirse por la exportación de iguales articulos para cualquiera otro pais estrangero; ni se establecera prohibición alguna respecto a la importación á exportacion de cualesquiera articulos del producto natural ó manufacturado de los territorios de la republica de Nicaragua para los de los Estados Unidos….."	Article IV: "They likewise agree, that whatever kind of produce, manufacture, or merchandise of any foreign country can be, from time to time, lawfully imported into the United States in their own vessels, may also be imported in vessels of the republic of Nicaragua…" Article V: "No higher other duties shall be imposed on the importation into the United States of any articles the produce or manufacture of the republic of Nicaragua, and no higher or other duties shall be imposed on the importation into the republic of Nicaragua of any articles the produce or manufactures of the United States, than are or shall by payable on the like articles being the produce or manufactures on any other foreign country; nor shall any higher or other duties or charges be imposed, in either of the two countries, on the exportation of any articles to the United States, or to the republic of Nicaragua, respectively, than such as are payable on the exportation of the like articles to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any articles the produce or manufactures of the United States, or of the republic of Nicaragua…"

Document	Reference	Description in Spanish	Description in English
		Artículo VI: "... las estipulaciones contenidas en ellos son aplicables en toda su estencion á los buques de Nicaragua y sus cargamentos que arriben á los puertos de los Estados Unidos, y recíprocamente á los buques de los Estados Unidos y sus cargamentos que arriben á los puertos de Nicaragua;....."	Article VI: "... the stipulations contained in the three preceding articles are, to their full extent, applicable to the vessels of the United States and their cargoes arriving in the ports of Nicaragua, and reciprocally to the vessels of the said republic of Nicaragua and their cargoes arriving in the ports of the United States...."
		Artículo VII: "....con respecto a las consignaciones y ventas por mayor ó menor de sus efectos y mercaderías, como con respecto á la carga, descarga y despacho de sus buque, ú otro negocios...	Article VII: "... with respect to the consignments and sale of their goods and merchandise, by wholesale or retail, as with respect to the loading, unloading, and sending off their ships; ..."
		Artículo VIII: "Los ciudadanos de una y otra de las partes contratantes no podrán ser embargados ó detenidos con sus embarcaciones, tripulaciones, mercaderias y efectos comerciales de su pertenencia, para ninguna expedición militar, ni para usos publicos ó particulares, cualesquiera que sean, sin conceder a los interesados una justa y suficiente indemnización."	Article VIII: "The citizens of neither of the contracting parties shall be liable to any embargo nor be detained with their vessels, cargoes, merchandise, or effects, for any military expedition, nor for any public or private purpose whatever, without allowing to those interested an equitable and sufficient indemnification."
		Artículo XXXV: "...y se estipula tambien que todo producto, manufacturas, mercancias ú otras propiedades de licito comercio, pertenecientes á ciudadanos de los Estados Unidos que pasen de un oceano al otro en ambas direcciones, con objeto de exportacion á paises estrangeros, no estarán sujetos á derechos de importacion ó exportacion.... habiendo introducido al estado de Nicaragua productos, manufacturas y mercancías con el objeto de venderlas...	Article XXXV: "...all lawful produce, manufactures, merchandise, or other property belonging to citizens of the United States passing from one ocean to the other, in either direction, for the purpose of exportation to foreign countries, shall not be subject to any import or export duties...having introduced such produce, manufacture, or merchandise into the state of Nicaragua, for sale or exchange.."

Document	Reference	Description in Spanish	Description in English
4 United States-Great Britain, Convention Concerning a Ship Canal Connecting the Atlantic and Pacific Oceans (Clayton-Bulwer), Washington DC, 19 April 1850 (in force 4 July 1850)	CRM Annex 4 CRR Annex 8 (Article V) Spanish version: MM Peralta, *El Canal Interoceánico de Nicaragua y Costa Rica en 1620 y en 1887* (Bruselas: Imprenta de Ad. Mertens, 1887) English version: 104 CTS 41	Artículo V: "…ya imponiendo exacciones opresivas ó peajes inmoderados sobre pasajeros, buques, géneros, mercancías ú otros artículos."	Article V: "…or by imposing oppressive exactions or unreasonable tolls upon passengers, vessels, goods, merchandise or other articles."
5 Costa Rica-United States Treaty of Friendship, Commerce and Navigation (Molina-Webster), Washington, 10 July 1851	CRR Annex 9 (Articles IV, VI, VII VII and XI) Spanish version: *Colecccion de los Tratados Internacionales Celebrados por la Republica de Costa Rica* (San José: Tipografía Nacional), 1893, Vol. I, pp. 65-72 English version: *Report of the Isthmian Canal Commission 1899-1901* (Washington: Government Printing Office, 1904) pp. 417-420	Artículo IV: "No se impondrán otros ó más altos derechos á la importación en los territorios de la República de Costa Rica, de cualesquiera artículos del producto natural, producciones ó manufacturas de los territorios de los Estados Unidos, ni se impondrán otros ó más altos derechos á la importación en los territorios de los Estados Unidos de cualesquiera artículos del producto natural, producciones ó manufacturas de la República de Costa Rica que los que se pagan ó pagaren por semejantes artículos cuando sean producto natural, producciones ó manufacturas de cualesquiera otro país extranjero, ni se pondrán otros ó más altos derechos ó impuestos en los territorios de cualquiera de las dos Altas Partes Contratantes á	Article IV: "No higher nor other duties shall be imposed on the importation into the territories of the United States, of any article being of the growth, produce or manufacture of the Republic of Costarica and no higher or other duties shall be imposed on the importation into the territories of the Republic of Costarica of any articles being the growth, produce or manufacture of the territories of the United States then are or shall be payable on the like articles, being the growth, produce or manufacture of any other foreign country; nor shall any other or higher duties or charges be imposed in the territories of either of the High Contracting Parties, on the exportation of any articles to the territories of the other, than such as are or may be payable on the exportation of the like articles to any other foreign country, nor shall any prohibition be imposed upon the exportation or importation of any articles the growth, produce or manufacture of the territories of the United States, or of the Republic of Costarica…"

Document	Reference	Description in Spanish	Description in English
		la exportación de cualesquiera artículos para los territorios de la otra, que los que se pagan ó pagaren por la exportación de iguales artículos para cualquiera otro país extranjero, ni se impondrá prohibición alguna á la exportación ó importación de cualesquiera artículos del producto natural, producciones ó manufacturas de los territorios de la República de Costa Rica…"	
		Artículo VI: "Se pagarán los mismos derechos de importación en los territorios de los Estados Unidos por las artículos de productos naturales, producciones y manufacturas, en buque de los Estados Unidos o Costarricenses; y los mismos derechos se pagarán por la importación en los territorios de la República de Costa Rica, de las manufacturas, efectos, y producciones de los territorios… Los mismos derechos pagarán, y gozarán las mismas franquicias y descuentos concedidos á la exportación para los territorios de los Estados Unidos de cualesquiera artículos, de los productos naturales, producciones ó manufacturas de la República de Costa Rica ….y pagarán los mismos derechos y se concederán las mismas franquicias y descuentos á la exportación para la República de Costa Rica. de cualesquiera artículos de productos naturales, producciones ó manufacturas de los territorios de los Estados Unidos…"	Article VI: "The same duties shall be paid on the importation into the territories of the Republic of Costarica, of any article being of the growth, produce or manufacture of the territories of the United States whether such importation shall be made in Costarican or in vessels of the United States; and the same duties shall be paid on the importation into the territories of the United States of any article, being the growth, produce or manufacture of the Republic of Costarica… The same duties shall be paid, and the same bounties and drawbacks allowed, on the exportation on the Republic of Costarica, of any articles being the growth, produce or manufacture of the territories of the United State…and the same duties shall be paid, and the same bounties and drawbacks allowed, on the exportation of any articles, being the growth, produce or manufacture on the Republic of Costa Rica to the territories on the United States…

Document	Reference	Description in Spanish	Description in English
		Artículo VII: "…ni estarán obligados á pagarles más salario ó remuneración que la que en semejantes casos se paga por ciudadanos de los Estados Unidos; y se concederá libertad absoluta en todos los casos al comprador y vendedor para ajustar y fijar el precio de cualesquiera efectos, mercaderías y géneros importados y exportados de la República de Costa Rica…"	Article VII: "…nor to pay them any other salary or remuneration than such as is paid in like cases by Costarican citizens; and absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any goods, wares, or merchandise imported into or exported from the Republic of Costarica…"
		Artículo VIII: "Por lo que toca á la policía de los puertos á la carga y descarga de buques, la seguridad de las mercancías, bienes y efectos, la sucesión de las propiedades personales por testamento ó de otro modo…"	Article VIII: "In whatever relates to the police of the ports, the lading and unlading of ships, the safety of merchandise, goods and effects, the succession to personal estates by will or otherwise…"
		Artículo XI: "…mientras se conduzcan pacíficamente y no cometan ofensa alguna contra las leyes, y sus bienes y efectos, de cualquiera clase que sean, bien que estén bajo su propia custodia, ó confiados á individuos, ó al Estado, no estarán sujetos a embargo o secuestro, ni á ninguna carga ó imposición que la que se haga con respecto á los efectos ó bienes pertenecientes á los ciudadanos del país…."	Article XI: "… in the full enjoyment of their liberty and property as long as the behave peaceable, and commit no offence against the laws; and their goods and effects if whatever description they may be, whether in their own custody or intrusted to individuals or to the State, shall not be liable to seizure or sequestration, nor to any other charges or demands than those which may be made upon the like effects or property belonging to the native citizens of the country in which such citizens may reside…"
6 Chamorro-Mayorga-White Convention, Granada, 14 August 1851	NCM Annex 3 English translation by Nicaragua	Artículo 7: "Todas las propiedades, cosas, acciones, derechos, créditos y efectos de la nueva compañía…	Article 7: "All properties, objects, shares, rights, credits, and effects of the new Company…"

Document	Reference	Description in Spanish	Description in English
7 Molina-Marcoleta, Preliminary Treaty, 28 January 1854 (unratified)	NCM, Annex 4 English translation by Nicaragua	Artículo 4: "…Los Ciudadanos de Costa Rica tendrán la facultad de entrar y salir libremente por el puerto de San Juan con sus buques y mercaderías y de navegar excepto por vapor por el río del mismo nombre y por los tributarios que se le unen por la parte del Sur y por el Lago de Nicaragua en todas direcciones, sin que pueda cobrárseles ningún impuesto ó derecho por parte de Nicaragua, salvo cuando fondeen en las calas, puertos ó parajes de que Nicaragua esta en actual posesión, ó cuando introduzcan productos ó mercaderías para el consumo de Nicaragua en cuyo caso se sujetaran á lo que dispongan las leyes de esta ultima República. "	Article 4: " … Costa Rican citizens shall have the power to freely come in and out through the port of San Juan with their ships and goods and to navigate, except by steamboat, on the river bearing the same name and on its tributaries flowing from the South, and on Lake Nicaragua in all directions, without being subject to any Nicaraguan taxes or levies, except when they drop anchor in coves, ports, or places currently in possession by Nicaragua or when they introduce products or goods for consumption in Nicaragua, in which case they shall be subject to the provisions of laws of the latter."
8 Costa Rica-Nicaragua Treaty of Limits (Cañas-Juárez), Managua, 6 July 1857, unratified	CRM Annex 5 English translation by Costa Rica	Artículo 5: "La República de Costa Rica lo mismo que la de Nicaragua, usarán libremente de las aguas del Río San Juan para la navegación y transporte de articulos de comercio de importación y exportación, respetando las leyes de aduana, y satisfaciendo los derechos fiscales de cada una de dichas Repúblicas tiene impuestos o imponga en lo sucesivo sobre los articulos que se introduzcan por sus respectivas aduanas.". Artículo 7: "Los productos y manufacturas naturales de ambas Repúblicas, pueden introducirse reciprocamente libres de todo impuesto fiscal, sugetos solamente á los de propios y advitrios municipales, pero no será permitida la introduccion de articulos monopolisados o estancados por los dos Gobiernos en sus respectivas Repúblicas	Article 5: "The Republic of Costa Rica, as well as the one of Nicaragua, will have free use of the waters of the San Juan River, for navigation and transportation of articles of trade of import and export, observing customs legislation, and complying with the fiscal duties of each Republic, as well as those that will be taxed over the articles that will be brought in through their respective customs." Article 7: "The original products and manufactured articles of both republics, may be mutually imported, free of tax, and will only be subjected to the own and local municipal taxes, but the import of those articles that have been monopolized or stagnated by both governments in their own republics, shall not be authorized."

Document	Reference	Description in Spanish	Description in English
9 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), Washington, 16 November 1857, unratified	NCM Annex 5 CRR Annex 10 (Articles IV, VII, VIII, XV and XVII) English version: CL Wiktor, *Unperfected Treaties of the USA, Volume II 1856-1882*, pp. 135-143 Spanish version: US National Archives, Washington DC, Unperfected Treaty Series W-2	Artículo IV: "No se impondrán otros o más altos derechos sobre la importación en los territorios de la República de Nicaragua de cualquier artículo que sea fruto, producto natural ó manufacturado de los Estados Unidos, y no se impondrán otros, ó mas altos derechos sobre la importación en los territorios de los Estados Unidos, de cualquier artículo que sea fruto, producto natural o manufacturado de la República de Nicaragua, que los que se exijan ó exijieren por iguales artículos que sean frutos, productos naturales ó manufacturados de cualquier otro país extranjero…"	Article IV: "No higher nor other duties shall be imposed on the importation into the territories of the United States of any article being the growth, produce, or manufacture of the Republic of Nicaragua, and no higher or other duties shall be imposed on the importation into the territories of the Republic of Nicaragua of any articles being the growth, produce, or manufacture of the territories of the United States than are, or shall be, payable upon the like article being the growth, produce, or manufacture of any other foreign country…."
		Términos similares en el Artículo VI	Similar wording in Article VI
		Artículo VII: "…en todos los casos se concederá absoluta libertad al comprador y al vendedor, para contratar y fijar el precio del cualquiera jéneros, efectos ó mercancías importadas á los Estados Unidos, ó esportadas de ellos…"	Article VII: "…absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any goods, wares, or merchandise imported into, or exported from, the Republic of Nicaragua…"
		Artículo VIII: "En todo lo que hace relación a…la seguridad de las mercancías, jéneros y efectos, a la sucesión de bienes muebles…"	Article VIII: "In whatever relates to…the safety of the merchandise, goods, and effects; the succession to personal states…"
		Artículo XV: "…En estos puertos no se impondrán…ningunos derechos de tonelada… sobre efectos ó mercancías pertenecientes á…"	Article XV: "…At these ports no tonnage or other duties shall be imposed or levied by the Government of Nicaragua…or on any effects or merchandise belonging to…"

Document	Reference	Description in Spanish	Description in English
		Artículo XVII: "…ó porque impongan exacciones opresivas, ó impuestos excesivos sobre las malas, pasajeros, buques, efectos, productos, mercaderías, ú otros artículos"	Article XVII: "…or by imposing oppressive exactions or unreasonable tolls upon mails, passengers, vessels, goods, wares, merchandise, or other articles."
10 Costa Rica-Nicaragua Treaty of Peace, Friendship, Alliance and Commerce (Mora-Martínez), Rivas, 30 April 1858	CRR, Annex 11 (Articles 18, 19 and 20) Spanish version: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909) English translation by Costa Rica	Artículo 18: "El comercio fronterizo por la vía de tierra será de libre tráfico, y ni los costarricenses en Nicaragua ni los nicaragüenses en Costa Rica pagarán por la introducción de los frutos naturales y de propia industria…." Artículo 19: "Se prohibe la introducción por tierra, bajo pena de comiso, de frutos y efectos extranjeros de la una á la otra República….Dichos efectos extranjeros…" Artículo 20: "…pero los efectos y mercaderías que en dichos buques se introduzcan…"	Article 18: "Land border commerce will have free traffic, and neither Costa Ricans in Nicaragua nor Nicaraguans in Costa Rica shall pay for the introduction of the natural growth or own manufacture…" Article 19: "The introduction by land is forbidden, under penalty of confiscation, of the foreign products and effects of one Republic into the other…Such foreign effects…." Article 20: "…but the effects and merchandise that in said vessels are introduced…"
11 Nicaragua-Costa Rica-F Belly, Convention relative to the Concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua, (Mora-Martínez-Belly), Rivas, 1 May 1858	CRM Annex 8 (Article 1) CRR Annex 12 (Article 14) French version: F. Belly, *Carte d'etude pour le trace et le profil du Canal de Nicaragua* (Paris: Chez Dalmont et Doud, Éditeurs, 1858), Document II.	French original: Artículo 14: "Par mesure spéciale, tous les bâtiments de la Compagnie concessionnaire, quel que soit leur pavillon, jouiront pendant dix ans de la franchise du passage, pourvu qu'ils ne transportent aucune marchandise d'exportation." Spanish original: Artículo 14: "Como medida especial, todos los buques de la compañía concesionaria, cualesquiera	Article 14: "As a special provision, all the vessels of the concessionary Company, whichever may be their flags, shall enjoy during ten years transit franchises, providing they do not transport any merchandise for exportation."

Document	Reference	Description in Spanish	Description in English
	Spanish version: Archives Diplomatiques, Ministere des Affaires Etrangeres, Paris, Republic of France English translation by Costa Rica	que sean sus pabellones, gozarán durante diez años de las franquicias del tránsito, con tal que no lleven mercancia alguna de exportación"	
12 Great Britain-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lennox Wyke-Zeledon), Managua, 11 February 1860	CRR Annex 15 (Articles IV, V, VII, XI, XVIII, XXIII) Source: 121 CTS 364 Both the Spanish and English versions are authentic.	Artículo IV: "Las partes contratantes convienen asimismo, en que cualquier clase de producto, manufactura, ó mercancía, que pueda ser de vez en cuando legalmente importada á los dominios Británicos …y de la misma manera, que cualquiera clase de producto, manufactura, ó mercancía que de vez en cuando pueda ser legalmente importada á la República de Nicaragua…Y además convienen en que cualquiera cosa que pueda ser legalmente exportada o reexportada de un pais…"	Article IV: "The Contracting Parties likewise agree, that whatever kind of produce, manufacture, or merchandize can be, from time to time, lawfully imported into the British…and in like manner, that whatever kind of produce, manufacture, or merchandize can be from time to time lawfully imported into the Republic of Nicaragua….And they further agree, that whatever may be lawfully exported or re-exported from the one country…"
		Artículo V: "No se impondrán otros ó mas crecidos derechos á la importación á los dominios Británicos, de cualquier artículo de vegetación, producto, ó manufactura de la República de Nicaragua,…que los que se pagan ó se pagaren en lo sucesivo por el mismo articulo ú otro semejante, del producto ó	Article V: "No higher or other duties shall be imposed on the importation into the British dominions of any article the growth, produce, or manufacture of the Republic of Nicaragua …than are or shall be payable on the same or the like article being the

Document	Reference	Description in Spanish	Description in English
		manufactura de cualquier otro pais extrangero…No se impondrá prohibición alguna a la importación á los territorios de una de las dos Partes Contratantes de cualquier articulo de vegetación, producto, ó manufactura de los territorios de la otra parte…ni se impondrá prohibición alguna á la exportacion de cualquier articulo que se haga de los territorios de cualquiera de las dos partes…."	produce or manufacture of any other country…No prohibition shall be imposed upon the importation of any article the growth, produce, or manufacture of the territories of either of the two Contracting Parties into the territories of the other,…nor shall any prohibition be imposed on the exportation of any article from the territories of either of the two Contracting Parties…"
		Artículo VII: "…y en uno y otro caso, no se impondrán ni exigirán derechos especiales en los puertos de uno y otro pais, sobre dichos buques ó sobre sus cargas, bien sea que esas cargas consistan en productos ó manufacturas naturales ó extranjeras."	Article VII: "…and, in either case, no discriminating duty shall be imposed or collected in the ports of either country on the said vessels or upon their cargoes, whether such cargoes shall consist of native or of foreign produce or manufacture."
		Artículo XI: "…y todos los géneros y mercancías que se salven, ó sus valores, si se vendieses, serán fielmente restituidos á los propietarios…Los géneros y mercancías que se salven e la ruina no pagarán derecho…"	Article XI: "… and all goods and merchandize which shall be saved therefrom, or the produce thereof, if sold, shall be faithfully restored to the owners…The goods and merchandize saved from the wreck shall not be subject to duties…"
		Artículo XVIII: "…y sus géneros y efectos, de cualquiera descripción que sean, ya estén en su propia custodia ó confiados á individuos ó al Estado, no estarán sujetos á embargo ó secuestro, no á otras cargas ó demandas que aquellas que se hagan sobre efectos o propiedades semejantes…"	Article XVIII: "…and their goods and effects, of whatever description they may be, whether in their own custody or entrusted to individuals or to the Satate, shall not be liable to seizure or sequestration or to any other charges or demands then those which may be made upon the like effects or property belonging…"

Document	Reference	Description in Spanish	Description in English
		Artículo XXIII: "…ó imponiendo opresivas exacciones ó irrazonables derechos sobre las malas, pasageros, buques, géneros, efectos, mercancías, ú otros artículos."	Article XXIII: "…or by imposing oppressive exactions or unreasonable tolls upon mails, passengers, vessels, goods, wares, merchandize, or other articles."
13 Nicaragua-Central American Transit Company Inter-Oceanic Transit Contract (Molina-Morris), Washington DC, 10 November 1863	NCM Annex 18 CRR Annex 16 (Articles XVIII and XXI) English translation of Article XVIII by Nicaragua As Nicaragua did not provide an English translation of Article XXI, English translation by Costa Rica. Source: NCM Annex 18	Artículo XVIII: "La Compañía podrá, sin tener obligación de pagar ningún impuesto ni derecho, introducir a la República materiales, maquinaria y cualesquiera otras cosas útiles y necesarias para el establecimiento….Bajo la inteligencia además de que la Compañía al introducir los artículos útiles, antes mencionados, a la República…" Artículo XXI: "El Gobierno desembarca y devuelve a la Compañía, el camino, estaciones, los muelles, vapores, resto de vapores y todos los demás objetos y propiedades de que la dicha Compañía…"	Article XVIII: "The Company, without being obligated to pay any tax or duty, may introduce into the Republic any materials, machinery and other things that are useful and necessary for the establishment…with the understanding that the Company, upon introducing the aforesaid useful articles to the Republic… Article XXI: "The Government disembarks and returns to the Company the road, stations, docks, steamers, the rest of the steamers and the other objects and property that the said Company…"

Document	Reference	Description in Spanish	Description in English
14 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson), Managua, 21 June 1867	CRR, Annex 17 (Articles VI, VII, VIII, XV and XVII) Source: GP Sanger, *The Statutes at Large, Treaties and Proclamations of the United States of America from December 1867, to March 1869, Vol XV* (Boston: Little, Brown, and Co., 1869) Both the Spanish and English versions are authentic.	Artículo VI: "Se pagarán los mismos derechos por la importación á los territorios de la república de Nicaragua de cualquier artículo que sea fruto, producto natural ó manufacturado de los territorios de los Estados Unidos, ya sea que tal importación sea hecha en buques de Nicaragua o en buques de los Estados Unidos, y se pagarán los mismos derechos por la importación en los territorios de los Estados Unidos de cualquier articulos que sea fruto, producto natural ó manufacturedo de la republica de Nicaragua…."	Article VI: "The same duties shall be paid on the importation into the territories of the republic of Nicaragua of any article being the growth, produce, or manufacture of the territories of the United States, whether such importation shall be made in Nicaraguan vessels or in the vessels of the United States; and the same duties shall be paid on the importation into the territories of the United States of any articles being the growth, produce, or manufacture of the republic of Nicaragua…"
		Artículo VII: "…se concederá absoluta libertad al comprador y al vendedor para contratar y fijar el precio de cualesquiera generos, efectos ó mercancias exportadas á ó de la república de Nicaragua…"	Article VII: "…absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any goods, wares, or merchandise imported into or exported from the republic of Nicaragua…"
		Artículo VIII: "En todo lo que hace relación á la policia de los puertos, á la carga y descarga de los buques, á la seguridad de mercancías, generos y efectos…"	Article VIII: "In whatever relates to the police of the ports, the lading and unlading of ships, the safety of merchandise, goods and effects…"
		Artículo XV: "….En estos puertos no se impondran ó exijiran por el gobierno de Nicaragua, ningunos derechos de tonelage ú otros, sobre los cuques de los Estados Unidos, ó sobre efectos ó mercancías pertenecientes á ciudadanos…"	Article XV: "…At these ports no tonnage or other duties shall be imposed or levied by the government of Nicaragua on the vessels of the United States, or on any effects or merchandise belonging to citizens…"
		Artículo XVII: "…que impongan exacciones opresivas ó impuestos exesivos sobre las malas, pasageros, mercancías ú otros artículos…."	Article XVII: "…by imposing oppressive exactions or unreasonable tolls upon the mails, passengers, vessels, goods, wares, merchandise, or other articles…"

Document	Reference	Description in Spanish	Description in English
15 Costa Rica-Nicaragua, Treaty of Commerce (Volio-Zelaya), San José, 14 August 1868	CRM Annex 10 English translation by Costa Rica	Artículo I: "Habrá entre las Repúblicas de Nicaragua y Costa Rica una recíproca libertad de comercio, en todos los artículos no prohibidos por sus respectivas leyes. En consecuencia, los ciudadanos de cualquiera de las dos partes, podrán ir por mar y por tierra, libre y seguramente con sus buques y cargamentos, y entrar en los puertos, ríos y territorios habilitados de la otra; y lo mismo que los naturales, podrán hacer el comercio, por mayor ó por menor, alquilar y ocupar casas y almacenes, fijar los precios á sus mercaderías…" Artículo II: "…se declara y establece, respecto de sus particulares y propias producciones; que las importaciones y exportaciones que se hagan de uno a otro punto, ya sea por mar ó por tierra, de los artículos ó productos naturales ó industriales, propios del país que lo remite, no pagarán derechos ni impuesto de ninguna clase." "§ Unico—Para evitar toda duda, lo mismo que cualquier fraude, se conviene: que los efectos de que habla este artículo, en su introducción al territorio ó dominios…" Artículo III: "Respecto al comercio y artículos extranjeros, ya sea en su importación ó en su exportación, por mar ó por tierra…"	Article I: "There shall be between the Republics of Costa Rica and Nicaragua a reciprocal freedom of trade in all the goods that are not prohibited by their respective laws. As a consequence, the citizens of any of the two parties may travel freely and safely by sea or by land with their ships and cargo, and enter through the ports, rivers and territories habilitated by the other party; the same as the nationals, they shall be able to do commerce, retail or wholesale, rent and occupy houses and warehouses, fix prices on their merchandise..." Article II: "…it is therefore declared and established, regarding their particular and own products: that the imports and exports that are made from one point to the other, either by sea or land, of the goods or natural or industrial products natural to the sender's country shall not pay rights or taxes of any kind" "Unique.- To avoid any doubt as well as any fraud, it is agreed: that the items considered in this Article, when they enter the dominion or territory…" Article 3: "Regarding trade and foreign goods, either for exporting or importing, by sea or land…"

Document	Reference	Description in Spanish	Description in English
16 Costa Rica-Nicaragua Convention (Esquivel-Rivas), San José, 21 December 1868	NCM Annex 7	Artículo 2: "El Gobierno de Nicaragua, por su parte, se compromete en caso de celebrar algún contrato de tránsito, sea con naturales ó extranjeros, á estipular: que las tarifas sobre fletes de productos ó mercaderías de importación ó exportación…"	Article II: "The Government of Nicaragua, on its part, commits to stipulate, in the event that any transit contract is entered into, whether with nationals or foreigners, that the freight rates established by Nicaragua for imported or exported products or merchandise…"
		Artículo 4: "En el caso en que San Juan deje de ser un puerto franco, y que el Gobierno de Nicaragua sujete á registro ó aforo las mercaderías que se importen, ó los productos que exporten por él, quedarán libres de tales formalidades y del pago de cualesquiera derechos, las mercaderías y productos que Costa Rica importe ó exporte."	Article IV: "In the event that San Juan ceases to be a free port, and the Government of Nicaragua subjects to registration or taxation the merchandise which is imported or the products which are exported through it, the merchandise and products imported or exported by Costa Rica shall be exempt from such formalities and from the payment of any duties"
17 Costa Rica-Nicaragua, Treaty for the excavation of an Inter-oceanic Canal (Jiménez-Montealegre), San José, 18 June 1869	CRM Annex 13 (Article 1) NCM Annex 8 (Articles 1, 2, 3, 12, 43, 44, and 45) CRR Annex 19 (Articles 9, 14, 16, 27 and 28)	Artículo 9: "El concesionario tendrá el derecho de tomar, en los terrenos que pertenezcan al Estado, sin pagar por ellos ninguna indemnización ó taza, los materiales de toda especie, como maderas, piedras, cales, puzolanas, tierras destinadas á rellenar y otros objetos que sean necesarios para la construcción y mantenimiento del canal" (…)	Article IX: "The contractor shall have a right to take from the lands belonging to the State the materials of all kinds, such as timber, stone, lime, puzzolana, earth for filling in, and other objects necessary for the construction and maintenance of the canal…"
	English translation of Article 12 by Nicaragua. As Nicaragua did not provide an English translation of Articles 9, 14, 16, 27 and 28, English version from (1870-1871) LXI *BFSP*	Artículo 12: "…La República de Costa Rica podrá abrir esos caminos aún en territorio de Nicaragua y navegar los ríos pertenecientes al mismo territorio con el objeto de dar salida para el canal á los productos de su agricultura, de su industria y de su comercio, y de hacer sus correspondientes introducciones, sin que en ningún caso Nicaragua ponga obstáculo para la apertura de tales caminos, ni la navegación de dichos ríos y que en la desembocadura de ellos, podrá Costa Rica establecer aduanas y almacenes de depósito por cuenta del Estado…"	Article XII: "…The Republic of Costa Rica may open such roads even in Nicaragua territory and navigate on the rivers in that territory, for the purpose of transporting and introducing its agricultural, industrial and commercial products to the canal. Nicaragua may not impede in any way whatsoever the opening of said roads, nor the navigation of said rivers; and in the mouths of these rivers, Costa Rica may establish customs and warehouses at the expense of the State…"

Document	Reference	Description in Spanish	Description in English
		Artículo 14: "El concesionario podrá introducir, libres de derechos de aduana y de cualquiera tasa, todos los artículos y objetos que sean necesarios para el uso de la empresa…"	Article XIV: "The contractor may import free of Custom-House duty or any other tax, all articles and objects necessary for the use of the undertaking. ."
		Artículo 16: "En cuanto á los artículos, cuya introducción es prohibida por la ley, el concesionario podrá llevarlos…"	Article XVI: "As for those articles of which the importation is prohibited by the law the contractor may bring them in…"
		Artículo 27: "…ni podrá imponer ningún derecho de tránsito, bajo cualquiera denominación que sea, á las mercancías conducidas como tales en dichos navíos, ni a los pasajeros ni tripulaciones."	Article XXVII: "…nor any transit duty, under whatsoever denomination, on the merchandise conveyed as such in the said ships, or on the passengers or crews."
		Artículo 28: "Las mercancías que estos navíos desembarquen y entreguen al comercio del país, quedarán sujetas á los derechos establecidos por la legislación general de la República"	Article XXVIII: "The merchandise disembarked by those ships and delivered to the commerce of the country, shall be subject to the duties fixed by the general laws of the Republic."
18 Costa Rica-Nicaragua, Treaty for the Deviation of the Waters of the Colorado River (Jiménez-Montealegre), San José, 21 June 1869	CRR Annex 20 (Articles 2 and 4) Source: JM Bonilla, *Collección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 403-405. English translation by Costa Rica	Artículo 2: "El Gobierno de Nicaragua por su parte, se compromete…que las tarifas sobre fletes de productos ó mercaderías de importación ó exportación…"	Article 2: "The Government of Nicaragua, on its part, undertakes that…the tariffs over freights of products or merchandise for importation or exportation…"
		Artículo 4: "En el caso de que San Juan del Norte deje de ser un puerto franco y que el Gobierno de Nicaragua sujete á registro ó aforo las mercaderías que se importen ó los productos que se exporten por él, quedarán libres de tales formalidades y del pago de cualesquiera derechos, las mercaderías y	Article 4: "In the event that San Juan del Norte ceases being a free port and that the Government of Nicaragua subjects to registration or appraisal the merchandise that is imported or the products that are exported through it, they will remain free from such formalities and from the payment of whatever

Document	Reference	Description in Spanish	Description in English
		productos que Costa Rica importe ó exporte, sin que en ningún caso…pueda oponerse obstáculo al comercio de importación y exportación de Costa Rica…pues se declara que dicho comercio de importación y exportación de Costa Rica queda absolutamente libre de toda traba, embarazo y derecho de toda clase."	dues the merchandise and products that Costa Rica imports or exports, without it being allowed in any case…may oppose obstacles to Costa Rica's commerce of import and export…since it is declared that said commerce of import and export of Costa Rica remains absolutely free of any hindrance, impediment or due of any kind."
19 Nicaragua-F.A. Pellas Navigation Contract, Managua, 1 March 1877	NCM Annex 19 English translation by Nicaragua	Artículo 1: "El Gobierno de Nicaragua concede al señor F.A. Pellas…el privilegio exclusivo…de navegar por vapores en río de San Juan del Norte i lago de Granada i el de transportar por ellos los productos del pais i mercancías destinadas al comercio interior de la República…"	Article 1: "The Government of Nicaragua grants to Mr. F.A. Pellas…the exclusive privilege…to navigate with steamboats the San Juan del Norte river and Lake Granada [lake Nicaragua] and transporting through them the fruits of the land as well as merchandise destined to the Republic's interior…"
20 Costa Rica-Nicaragua Treaty of Limits (Alvarez-Zambrana), Granada, 5 February 1883, unratified	NCM Annex 9 English translation by Nicaragua	Artículo 4: "Costa Rica tendrá el derecho de abrir en el territorio de Nicaragua los caminos que necesite para la importación o exportación de sus efectos, por el Lago de Nicaragua…"	Article 4: "Costa Rica shall have the right to open in the territory of Nicaragua the necessary roads for importing and exporting its effects, through Lake Nicaragua…"

Document	Reference	Description in Spanish	Description in English
21 Costa Rica-Nicaragua, Treaty of Limits (Navas-Castro), San José, 19 January 1884, unratified	NCM Annex 10 English translation by Nicaragua	Artículo IV: "Para el caso de que se lleve á efecto la construcción del ferrocarril indicado en la cláusula precedente, el Gobierno de Nicaragua se reserva el derecho de establecer una aduana con sus correspondientes empleados y dependencias en el punto de partida de la línea férrea, ya sea en la ribera del Lago ó en cualquiera de los rios mencionados, destinado dicho establecimiento al registro de mercancías que de ó para Nicaragua se importen ó exporten…Costa Rica no cobrará derechos de aduana, ni otros impuestos nacionales ó locales por razón del tránsito de mercancías dentro de su territorio…"	Article IV: "In the event of the construction of the railroad line indicated in the foregoing article, the Government of Nicaragua reserves the right to set up a customs-house, with its respective employees and offices, at the starting point of the railroad line, either on the bank of the Lake or at any of the aforementioned rivers, with the objective of registering any merchandise which is imported to or exported from Nicaragua … Costa Rica shall not charge custom duties or other national or local taxes for in-transit merchandise in its territory…"
		Artículo IX: "Costa Rica tiene el derecho de abrir en el territorio de Nicaragua los caminos que necesite para la importación o exportación de sus efectos por el Lago de Nicaragua y el río Colorado, río y puerto de San Juan del Norte…"	Article IX: "Costa Rica shall have the right to build, within the territory of Nicaragua, the roads which are necessary to import and export its effects through the Lake of Nicaragua, the Colorado River, and the river and port of San Juan del Norte…"
22 Costa Rica-Nicaragua, Treaty of Peace, Friendship, Commerce and Extradition (Navas-Castro), San José, 19 January 1884, unratified	CRR Annex 22 (Articles VIII, XIX, XXIX and XXXIII) Source: JM Bonilla, *Colleción de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 455-466. English translation by Costa Rica	Artículo VIII: "…En cuanto á los derechos civiles, dicho goce y equiparación serán desde luego absolutos, sin reserva ni diferencia alguna, especialmente en cuanto á libertades y seguridades personales y de domicilio, á los medios de adquirir bienes de toda clase, poseerlos, conservarlos, transferirlos y transportarlos dentro y fuera de la República y al ejercicio del comercio y la navegación…"	Article VIII: "…Regarding Civil rights, their attribution and equivalence shall of course be absolute, with no reservations or differences, especially in regard to freedom and safety, both personal and domiciliary, as to the means of acquiring goods of any kind, possessing, keeping, transferring and transporting them inside and outside the Republic and to the practice of trade and navigation…."

Document	Reference	Description in Spanish	Description in English
		Artículo XIX: "…que las importaciones y exportaciones que se hagan de uno á otro punto, ya sean por mar ó por tierra, de los artículos ó productos naturales é industriales propios del país que los remite, no pagarán derechos ni impuestos de ninguna clase, sean fiscales ó locales. Para evitar toda duda, lo mismo que cualquier fraude, se conviene en que los productos de que habla este artículo, en su introducción al territorio ó dominios de la una parte, deberán ir acompañados de una guía expedida…en que se hará constar ser de ella el origen ó procedencia de dichos productos…"	Article XIX: "…that the imports and exports that are made from one point to the other, either by sea or land, of the articles or natural and industrial products natural to the sender's country shall not pay rights or taxes of any kind, either fiscal or local. To avoid any doubt as well as any fraud, it is agreed that the products referred to in this article, when they enter the territory or dominion of one of the parties, shall be accompanied by a bill of lading issued…in which the origin of said products…"
		Artículo XXIX: "Cuando haya lugar á la extradición, todos los objetos aprehendidos, que tengan relación con el delito y sus autores se entregarán sin perjuicio del derecho de tercero, á la República reclamante…"	Article XXIX: "When the extradition proceeds, all objects seized that have any relation to the crime and its perpetrators shall be rendered, with due respect to the rights of third parties, to the requesting Republic..."
		Artículo XXXIII: "Los gastos que causen el mantenimiento y transporte del individuo reclamado, y también la entrega y traslación de los objetos, que por tener relación con el delito deban restituirse y remitirse, serán a cargo de la República que solicite la entrega."	Article XXXIII: "The expenses incurred by the maintenance and transport of the requested individual, as well as the delivery and transport of the objects that must be sent and returned on account of their relation to the crime, shall be paid by the Republic that requests the delivery."

Document	Reference	Description in Spanish	Description in English
23 United States of America-Nicaragua, Treaty providing for the construction of an Inter-Oceanic Canal across the territory of Nicaragua (Frelinghuysen-Zavala), Washington, 1 December 188	CRR Annex 23, Article IV Sources: English version: *Report of the Isthmian Canal Commission, 1899-1901*, Appendix L, pp. 359-363 Spanish version: *Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica* (San José: Imprenta Nacional, 1884-1885)	Artículo IV: "Con el objeto de llevar a cabo este convenio…" (…) para los depósitos de aguas, diques, muelles, arsenales, accesorios de las esclusas, faros, señales, almacenes, talleres, edificios y para cualesquiera otros objetos necesarios…"	Article IV: "For the purpose of carrying out this agreement…for reservoirs, dykes, piers, docks, spaces about locks, for lights, beacons, storehouses, machine shops, buildings, and for whatever other thing necessary…"
24 Costa Rica-Nicaragua Treaty of Peace, Commerce and Extradition (Esquivel-Chamorro), San José, 9 October 1885	CRR Annex 24 (Articles VII, XVIII, XXVIII and XXXII) Spanish version: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 489-498	Artículo VII: "…especialmente en cuanto a libertades y seguridades personales y de domicilio, a los medios de adquirir bienes de toda clase, poseerlos, conservarlos, transferirlos..." Artículo XVIII: "…que las importaciones y exportaciones que se hagan de uno a otro punto, ya sean por mar o por tierra, de los artículos o productos naturales propio del pais…Para evitar toda duda, los mismo que cualquier fraude, se	Article VII: "…particularly in regard to freedoms and personal and domiciliary guarantees, to the means of acquiring goods of any kind, to possess, preserve and transfer them …" Article XVIII: "…that the imports and exports made from one point to the other, either by sea or land, of the articles or natural products from the country…To avoid any doubt, as well as any fraud,

Document	Reference	Description in Spanish	Description in English
	English translation by Costa Rica	explica: que los productos de que habla este artículo son los de libre comercio en el país, donde se introducen y se conviene en que dichos productos al ser introducidos en el territorio o dominios de la una parte, deberán ir acompañados de una guía expedida por la autoridades competentes de la otra en que se hará constar ser de ella el origen o procedencia de dichos productos…"	it is stated: that the products mentioned in this article are those of free trade in the country where they are introduced and it is agreed that said products, when introduced into the territory or domains of one party, shall be accompanied by a bill of lading issued by the competent authorities of the other in which the origin of said products from that party shall be certified…"
		Artículo XXVIII: "Cuando haya lugar a la extradición todos lo objetos aprehendidos que tengan relación con el delito y sus autores se entregarán…"	Article XXVIII: When the extradition proceeds, all objects seized that have any relation to the crime and its perpetrators shall be rendered…"
		Artículo XXXII: "Los gastos que causen el mantenimiento y traspaso del individuo reclamado, y también la entrega y traslación de los objetos que por tener relación…"	Article XXXII: "The expenses incurred by the maintenance and transfer of the requested individual, as well as the delivery and transport of the objects that by having relation..."
25 Contract between the Government of the Republic of Nicaragua and the Nicaragua Canal Association of New York for the opening of an inter-oceanic canal (Cárdenas-Menocal). Managua, 23 March 1887	NCM Annex 20 (Article 5) CRR Annex 25 (Articles 30 and 40) English translation of Article 5 by Nicaragua.	Artículo 5: "El Estado se compromete a no hacer ninguna concesión ulterior para la apertura de un Canal entre los dos Océanos, mientras dure el presente privilegio, y se abstendrá también durante el mismo tiempo, de hacer la concesión de un Ferrocarril que hiciera competencia al Canal para el trasporte de mercancías, … Artículo 30: "La compañía no podrá introducir al territorio de la República, mercancías con el objeto de traficar con ella, si no fuere pagando	Article V: "The Estate (sic) binds itself not to make any subsequent concession for the opening of a canal between the two oceans during the term of the present concession, and also to abstain from granting a concession for a railroad, such as might compete with the canal for the transportation of merchandise…. Article XXX: "The company shall not import merchandise into the territory of the Republic, for the purpose of trafficking, without paying the

Document	Reference	Description in Spanish	Description in English
	English translation of Articles 30 and 40 from *Report of the Isthmian Canal Commission 1899-1901* (Washington: Government Printing Office, 1904) pp. 389-400	los derechos de aduana establecidos por ley. Sin embargo, podrá introducir libres de derechos de aduana y de cualesquiera impuestos, los artículos necesarios para los trabajos de la empresa… para el trabajo de los talleres que la Compañía mantenga en actividad; pudiendo consistir dichos artículos en utensilios, máquinas, aparatos, carbón… Estos objetos podrán transitar ente cualesquiera puntos donde hayan de necesitarse durante los trabajos de apertura del Canal…. Se exceptúan de la franquicia contenida en este artículo, los objetos que no sean de libre comercio,"	import duties established by law. But it may import free of custom duties, and of any tax whatsoever, the articles needed for the works of the enterprise… for running the workshops the company may keep in operation; and such articles may consist of tools, machinery, apparatus, coal… These articles may be transported between whatever points they may be required during the works of opening of the canal… Goods, the commerce of which is not free, are excepted from the privileges contained in this article,"
		Artículo 40: "…Pero por las mercaderías que se embarquen ó desembarquen…"	Article XL: "…But all such merchandise as shall be loaded or discharged…"
26 Contract between the Government of the Republic of Costa Rica and the Nicaragua Canal Association for the opening of an inter-oceanic canal (Pérez-Menocal), San José, 31 July 1888	CRR Annex 27 (Articles XXVI, XXXVI, XXXVII, XXXIX and XL) Spanish version: Archivo Nacional de Costa Rica	Artículo XXVI: "La Asociación no podrá introducir en el territorio de la República mercancías con el objeto de traficar con ellas, sino fuere pagando los derechos de Aduana establecidos por la ley; sin embargo, podrá introducir libre de tales derechos y de cualesquiera otros impuestos, los artículos necesarios para los trabajos de la Empresa .	Article XXVI: "The Association cannot import merchandise into the territory of the Republic for the purposes of trafficking with it without paying the custom duties established by law, but it shall have the right to import free from custom duties and of any other imposts whatsoever, the articles needed for the works of the enterprise…and the said articles may consist of implements, machinery,

Document	Reference	Description in Spanish	Description in English
	English version: AR Colquhoun, *The Key of the Pacific: The Nicaragua Canal* (Westminster: Archibald Constable & Co., 1895) pp. 386-407	consistirán dichos artículos en utensilios, máquinas, aparatos…Estos objetos podrán transitar ente cualesquiera puntos donde haya necesidad, durante los trabajos de la construcción del Canal…Se exceptúan de la franquicia contenida en este artículo, los objetos que no sean de libre comercio…	apparatus… These articles may be transported between whatever points they may be needed the work of the construction of the canal…Those articles the commerce of which is not free are excepted from the privileges granted in this Article, and shall remain subject…"
		Artículo XXXVI: "La Republica de Costa Rica no establecerá derecho de tonelaje, anclaje, pilotaje, faro, ó ningún otro sobre las embarcaciones de cualquiera clase que sean, ni sobre las mercancías, equipajes y pasajeros, que transiten por el Canal…"	Article XXXVI: "The Republic of Costa Rica shall not establish any tonnage, anchorage, pilot or lighthouse dues, or any other charges of any kind whatsoever, upon vessels of any class whatever, or upon the merchandise, baggage and passenger which may pass through the canal…"
		Artículo XXXVII: "A fin de asegurar la más amplia libertad de tránsito para personas y propiedades, habrá en cada margen del canal una zona libre… Las mercancías que se embarquen ó desembarquen en cualquier puerto del Canal dentro del territorio de Costa Rica…."	Article XXXVII: "For the purpose of securing the most ample liberty or the transit of persons and property, a free zone shall be established on each side of the canal…All merchandise that shall be loaded or discharged at any point of the canal within the territory of Costa Rica…"
		Artículo XXXIX: "…tendrá la Asociación el derecho de establecer y percibir por el pasaje de los buques y embarcaciones de toda clase, el de viajeros y mercancías á través del Canal y en las aguas y puertos de su dependencia…"	Article XXXIX: "…the said association shall have the right to establish and collect for the passage of all kinds of ships, vessels, travelers and merchandise through the canal…"
		Artículo XL: "…También se concede una rebaja de un cincuenta por ciento en la tarifa general á cualquier buque que comience su navegación con destino al extranjero, en cualquiera de los puertos pertenecientes á la República, y cuyo cargamento se componga en su totalidad de productos del país…."	Article XL: "…A reduction of fifty per centum of the general tariff is also granted to all vessels that begin their voyage for a foreign country at any of the ports belonging to the Republic, with a cargo wholly consisting of products of the country.…

Document	Reference	Description in Spanish	Description in English
27 Costa Rica-Nicaragua, Treaty of Limits (Guerra-Castro), Managua, 23 December 1890	NCM Annex 12 English translation by Nicaragua	Artículo VI: "…y que haga difícil el embarque y desembarque de todas clase de mercaderías…. El expresado derecho de uso tiene por objeto el transporte, embarque y desembarque de toda clase de mercaderías, sin restricción ninguna, la construcción de ferrocarriles y muelles; la fundación de oficinas, establecimientos comerciales y casas de habitación, las cuales, así como las personas que habiten dicha faja de terreno, estarán sometidos á la jurisdicción y leyes de Costa Rica. … Artículo VII: "Con el fin de que á Nicaragua le quede espacio suficiente de costa no rocallosa en la Bahía de Salinas, para el embarque y desembarque de toda clase de mercaderías…"	Article VI: "… and it makes it difficult to load and unload all classes of merchandise…The purpose of the aforesaid right of use is to transport, load and unload all kinds of merchandise, without restriction, build railways and wharves; establish offices, commercial stores and residential houses, which shall be subject, as well as the persons who inhabit this tract of land, to the jurisdiction and laws of Costa Rica. … Article VII: "So that Nicaragua has sufficient space of non-rocky coast at Salinas Bay for loading and unloading all kinds of merchandise…"

Chapter 4

Nicaragua's Breaches

A. Introduction

4.01 The facts of the present matter are simple. Nicaragua gradually started infringing Costa Rica's navigational rights on the San Juan during the context of the Nicaraguan Civil War (1980-1989). Although the initial restrictions on Costa Rican navigation were justified as temporary, exceptional measures to protect Nicaragua's national security in the context of an armed conflict,[383] and although some of the restrictions were suspended when Costa Rica protested, during the mid-1990s the situation worsened, particularly after 14 July 1998 when Nicaragua prohibited navigation by Costa Rican police.

4.02 After Costa Rica filed its Application in September 2005, Nicaragua implemented additional restrictions on Costa Rican navigation, both public and private, including visa and passport requirements and a prohibition of fishing for riparians, reaching a point where Costa Ricans are actively discouraged from using the San Juan River at all. Nicaragua has gradually increased its military presence in the border area. The Nicaraguan press reported that new military posts were opened in the area in March 2007,[384] against a background where Nicaraguan authorities have threatened to use force to prevent Costa Rican navigation.[385]

4.03 Nicaragua's unlawful restrictions and hindrances to Costa Rica's use of the San Juan River have caused considerable harm to the local inhabitants who need to use the River on a daily basis; to the boatmen who transported tourists

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[383] See e.g. the note from Nicaraguan Ambassador in Costa Rica, Javier Chamorro Mora, to Costa Rican Foreign Minister, Bernd Niehaus Quesada of 12 November 1980: CRM, Annexes, Vol 3, Annex 40. See also the following press notes in CRM, Annexes, Vol 5: "Nicaragua conditions navigation on the waters of the San Juan River", (Annex 111); "Nicaraguans announce control on the San Juan", (Annex 115); "Ramirez offers gradual respect to navigation on the San Juan River" (Annex 122); and "Nicaragua guarantees freedom on the San Juan River" (Annex 121).

[384] "New Army Posts in the San Juan River", *El Nuevo Diario*, Managua, 26 March 2007: CRR, Annexes, Vol 2, Annex 58.

[385] See this Reply, paragraph 4.52; see also Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, Nicaraguan Official Gazette No. 188 of 29 September 2005: CRR, Annexes, Vol 2, Annex 69.

— a majority of whom have seen their businesses seriously affected; to the State institutions that formerly provided security, health care and other social services to the inhabitants; and to the inhabitants themselves, many of them Nicaraguan nationals, who have lost access to those services.

4.04 The present Chapter responds to Nicaragua's claims that it has not breached Costa Rica's navigational and related rights. It demonstrates that Nicaragua's breaches of those rights are continuing.

Section B deals with the breaches of Costa Rica's perpetual right of free navigation. Subsection (1) deals with the obligation to land at the Nicaraguan bank and pay for a "departure clearance certificate." Subsection (2) examines Nicaragua's imposition of other charges, including immigration and tourist fees. Subsection (3) demonstrates that Nicaragua has required Costa Ricans and foreigners on Costa Rican vessels to carry passports and visas. Subsection (4) discusses Nicaragua's imposition of timetables on Costa Rican navigation and subsection (5) examines the searches conducted by Nicaraguan authorities to Costa Rican vessels and passengers.

Section C addresses the breaches of Costa Rica's right of navigation "for purposes of commerce," including navigation by Costa Rican Government officials for purposes of communication and the provision of health, social and educational services, and navigation of Costa Ricans generally in order to communicate between places on the Costa Rican bank of the River.

Section D deals with the breaches of Costa Rica's right of protection of commerce, safeguard, defence and re-supply of police posts, and in particular with navigation of Costa Rican police in accordance with the 1858 Treaty and the 1888 Cleveland Award.

Section E examines the breaches of Costa Rica's related rights, including the imposition of a requirement to fly the Nicaraguan flag, the prohibition of subsistence fishing by Costa Rican riparians, denial of the right to land on the Nicaraguan bank and Nicaragua's obligation to facilitate traffic on the River in accordance with the 1956 Agreement.

Section F deals with Nicaragua's plea that Costa Rica has acquiesced in Nicaragua's violations of its rights. It addresses three specific allegations: measures relating to tourism arising from the Memorandum of Understanding between the Ministers of Tourism of 5 June 1994; navigation of Costa Rican police on the River; and the allegation that

Costa Rica recognises the need to obtain permission to navigate on the San Juan.

In a concluding section (**Section G**) Costa Rica discusses Nicaragua's strategy of "militarization" of the San Juan border area in an effort to actively discourage Costa Rican navigation.

B. Breaches of Costa Rica's perpetual right of free navigation

(1) The obligation to land at the Nicaraguan bank and payment for a "departure clearance certificate"

4.05 In its Memorial, Costa Rica presented the following evidence:

(i) In the early 1980s, Nicaraguan army authorities began demanding that Costa Rican vessels on the San Juan land at their posts on the Nicaraguan bank, report to the Nicaraguan authorities and pay for a "departure clearance certificate." This was required even when Costa Rican vessels were navigating from one point in Costa Rican territory to another. This practice was suspended in 1982 when Costa Rica protested,[386] and only occasionally occurred after the end of the Nicaraguan civil war.

(ii) In 2001 Costa Rican riparians complained that they were being charged US$25 per vessel for permission to navigate on the River. Costa Rica has repeatedly protested this measure,[387] but despite these protests the "departure clearance certificate" continues to be charged. The cost has varied between US$25 and US$5 and appears to vary according to the particular Nicaraguan post where it is issued. Costa Rica's Memorial annexed evidence of the imposition of a charge in the form of a "departure clearance certificate", in the form of notes of protest,[388] affidavits,[389] press reports[390] and copies of several "departure clearance certificates."[391]

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[386] Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note of 16 July 1982: CRM, Annexes, Vol 3, Annex 42.

[387] Costa Rican Deputy Foreign Minister, Elayne Whyte, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 18 April 2001: CRM, Annexes, Vol 3, Annex 70.

[388] Costa Rican Deputy Foreign Minister, Elayne Whyte, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 18 April 2001: CRM, Annexes, Vol 3, Annex 70; Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 9 May 2001: CRM, Annexes, Vol 3, Annex 71; and Costa Rican Foreign Minister, Roberto Rojas, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 26 September 2001: CRM, Annexes, Vol 3, Annex 73.

4.06 In its Counter-Memorial, Nicaragua did not deny this evidence, nor did it present any evidence to contradict it.

4.07 Since Costa Rica submitted its Memorial, Nicaraguan authorities have continued to impose an obligation to land at the Nicaraguan bank and to pay a "departure clearance certificate." The current cost is US$10 per vessel for each one-way trip.[392]

4.08 Annexed to this Reply is further evidence of these continuing breaches, constituted by:

(i) a receipt dated 25 October 2007 for a "departure clearance certificate" charged to a Costa Rican boatman which indicates he was charged ¢6.000 (equivalent to approximately US$11.50);[393]

(ii) new affidavits, including that of Víctor Julio Vargas Hernández, who states:

> "the application of restrictions and the threats to Costa Ricans are increased or made more severe when the guards are changed on posts. To allow Costa Rican navigation sometimes they demand payment in goods, through cigarettes, liquor or food."[394]

(iii) an affidavit of Marleny Rojas Vargas referring to an incident where she was forced to land on the Nicaraguan bank:

> "on one occasion a woman had a medical emergency, and urgently required some medicine, and when trying to help her, in order to obtain the medicine from the shop that sold it, in Costa Rican territory, she was forced to cross the San Juan River to request permission to make the purchase."[395]

In respect of this affidavit, Sketch Map 2 opposite page 695, demonstrates that although the witness' house and the store where the medicine was sold were both in Costa Rican territory and only a short distance by boat, the witness was forced to cross all the way to the Nicaraguan Army Post to report and then return to Costa Rican territory to purchase the medicine.

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[389] Affidavit of 5 May 2001: CRM, Annexes, Vol 4, Annex 83.

[390] "Nicas insist on charging", *La Nación*, San José, 8 May 2001: CRM, Annexes, Vol 5, Annex 169.

[391] CRM, Annexes, Vol 6, Annexes 241(a) and (b).

[392] If payment is made in Costa Rican currency, the amount payable appears to vary according to the way in which the local Nicaraguan authorities calculate the exchange rate.

[393] "Departure clearance certificate" charged to Jorge Lao, 25 October 2007: CRR, Annexes, Vol 2, Annex 71.

[394] Affidavit of Victor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54. For similar evidence, see also Affidavits of Leonel Morales Chacón, 30 April 2007: CRR Annexes, Vol 2, Annex 50; and Carlos Lao Jarquin, 28 July 2007: CRR Annexes, Vol 2, Annex 51.

[395] Affidavit of Marleny Rojas Vargas, 29 July 2007: CRR Annexes, Vol 2, Annex 54.

(2) Other charges

4.09 In its Memorial, Costa Rica presented the following evidence:

(i) By the mid-1990s, in addition to the charge for the "departure clearance certificate," Nicaraguan authorities charged US$5 for a "tourist card" to every passenger on a Costa Rican vessel on the San Juan, even where the vessel was transiting from one part of Costa Rican territory to another.[396] Failure to pay could entail a security risk for Costa Rican passengers, since the Nicaraguan army officials were heavily armed.[397]

(ii) Costa Rica protested this measure[398] and the Nicaraguan Foreign Minister responded that the charge would not apply to Costa Ricans but only to other passengers.[399] The Nicaraguan press also reported that the charge would only apply to travel beyond the area where Costa Rica has a perpetual right of free navigation.[400] Despite this response, the charge was not suspended and has continued to apply to all Costa Ricans and passengers on Costa Rican vessels, including riparians of the River, and to the entire area in which Costa Rica has a perpetual right of free navigation.[401]

(iii) Costa Rica protested once again in May 2001.[402] Despite an exchange of notes by both Foreign Ministers, the US$5 not only continued to be charged but in early 2002 an additional US$2 was charged on grounds of "immigration fees for entering Nicaraguan territory."[403] In May 2002 a further US$2 was added, purportedly as "immigration fees for existing Nicaraguan territory".[404] Thus, from May 2002 until the present time, all passengers on Costa Rican vessels are forced to pay US$9 to navigate on the San Juan, even when the travel is between places on Costa Rican territory.

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[396] "Conflict with the Nicaraguans due to tourism on the San Juan", *La Nación*, San José, 5 March 1994: CRM, Annexes, Vol 5, Annex 123; "Ticos were machine-gunned at the San Juan River", *La Nación*, San José, 8 March 1994; CRM, Annexes, Vol 5, Annex 124.

[397] "$5 to navigate on the San Juan River", *La Nación*, San José, 10 March 1994: CRM, Annexes, Vol 5, Annex 126.

[398] Costa Rican Foreign Minister, Bernd Niehaus Quesada, to Nicaraguan Ambassador in Costa Rica, Alfonso Robelo, Note of 15 March 1994: NCM, Vol II, Annex 41.

[399] Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note of 17 March 1994: CRM, Annexes, Vol 3, Annex 48.

[400] "Problems with Ticos solved", *La Prensa*, Managua, 8 March 1994: CRM, Annexes, Vol 5, Annex 125.

[401] See Affidavit of 5 May 2001: CRM, Annexes, Vol 4, Annex 83.

[402] Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 9 May 2001: CRM, Annexes, Vol 3, Annex 71.

(iv) Evidence of these charges was annexed to Costa Rica's Memorial, including copies of the US$5 "tourist cards" charged to Costa Ricans in 2001 and 2005;[405] copies of "transit permit through the border points" (another term for the US$5 charge) paid in 2005 and 2006;[406] and copies of the receipts for the payment of the US$4 "migratory service (entry and exit) paid in 2005 and 2006.[407] The imposition of these charges was confirmed by numerous statements of boatmen and hotel owners describing the hardships they have endured as consequence of these charges.[408]

4.10 In its Counter-Memorial, Nicaragua did not deny the imposition of these charges, nor did it present any evidence to contradict the evidence presented by Costa Rica.

4.11 Since then, Nicaraguan authorities have continued to impose these charges on Costa Rican navigation. Annexed to this Reply is evidence of these continuing breaches, including

(i) new affidavits;[409]

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[403] "Nicas raise River charge", *La Nación*, San José, 21 May 2002: CRM, Annexes, Vol 5, Annex 174.

[404] "Nicas raise River charge", *La Nación*, San José, 21 May 2002: CRM, Annexes, Vol 5, Annex 174.

[405] CRM, Annexes, Vol 6, Annexes 242(a) and (b).

[406] CRM, Annexes, Vol 6, Annexes 243(a) and (b).

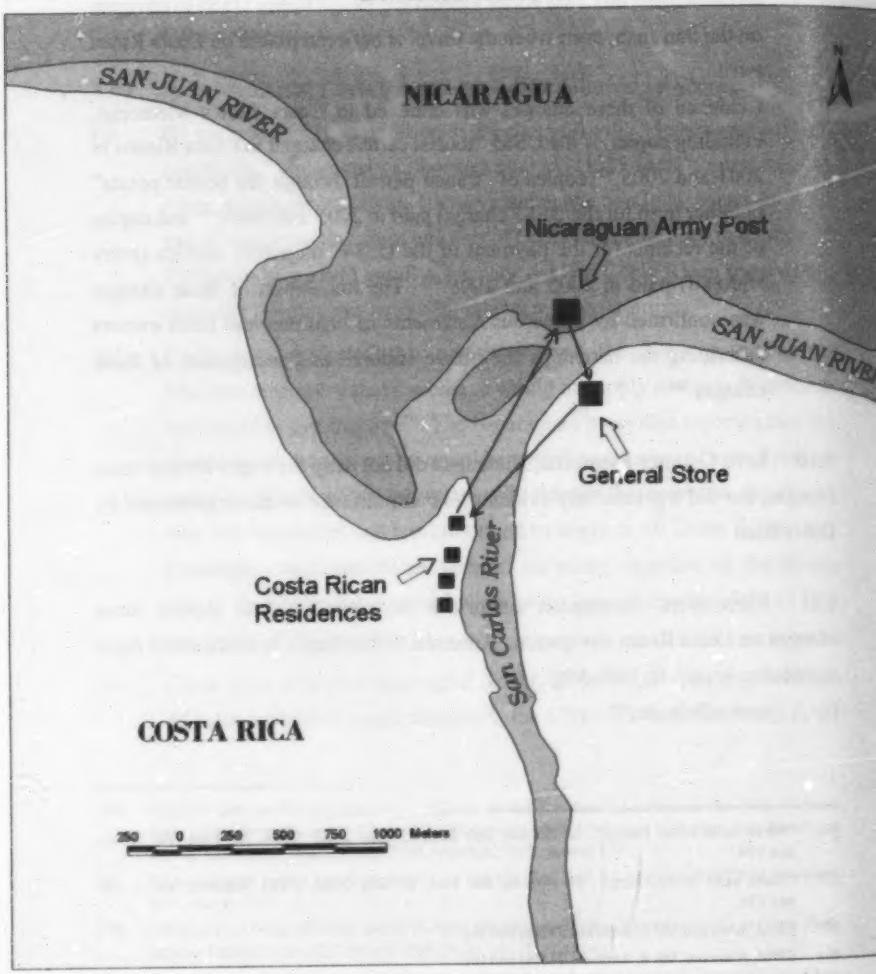
[407] CRM, Annexes, Vol 6, Annexes 245(a) and (b).

[408] See for example the following Affidavits in CRM, Annexes, Vol 4: Carlos Lao Jarquín (Annex 84); Geovanny Navarro Garro (Annex 85); Pablo Gerardo Hernández Varela (Annex 86); Santos Martín Arrieta Flores (Annex 87); Marvin Hay-Gonzalez (Annex 91); Windel Hodgson Hodgson (Annex 93); Daniel Reese Wise (Annex 95); and Wilton Hodgson Hodgson (Annex 96).

[409] See for example Affidavit of Victor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

Sketch map 2

BOCA SAN CARLOS


SAN JUAN RIVER
NICARAGUA
N
Nicaraguan Army Post
SAN JUAN RIVER
General Store
Costa Rican Residences
San Carlos River
COSTA RICA
250 0 250 500 750 1000 Meters

(ii) an official receipt issued on 25 October 2007 to a Costa Rican boatman for US$4 for a "Immigration Dispatch";[410] and

(iii) a receipt for US$5 dated 25 October 2007 for a "Transit permit at border point".[411]

(3) Visas and passports

4.12 In its Memorial, Costa Rica presented the following evidence:

(i) In response to Costa Rica instituting the present proceedings, starting in October 2005, Nicaraguan authorities required Costa Ricans, and other foreign nationals from countries that require a visa to enter Nicaragua, to carry their passports with a Nicaraguan visa while navigating on the San Juan in Costa Rican vessels.[412] If these requirements were not met, Costa Rican boatmen and passengers were prevented from navigating on the River.[413] In one incident, a Costa Rican boatman was detained for several hours for failing to carry a Nicaraguan visa.[414]

(ii) The total cost of the visa is US$25, plus expenses related to travelling to the nearest Nicaraguan Consulate, which at the time Costa Rica submitted its Memorial was in the capital city of San José.[415] This constitutes an additional expense to the charges described above, which brings the total to US$34 per passenger for each trip, plus "departure clearance fees" of US$20 per vessel.

(iii) Costa Rica's Memorial demonstrated that this measure has practically destroyed Costa Rican commercial transportation of tourists in the route between Puerto Viejo de Sarapiquí and Barra del Colorado or Tortuguero, all on Costa Rican territory.[416]

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[410] "Immigration dispatch" charged to Jorge Lao, 25 October 2007: CRR, Annexes, Vol 2, Annex 72(a)

[411] "Transit permit at border point" charged to Jorge Lao, 25 October 2007; CRR, Annexes, Vol 2, Annex 72(b).

[412] See for example the following press notes in CRM, Annexes, Vol 5: "Ticos will pay for a visa", *El Nuevo Diario*, Managua, 19 October 2005 (Annex 188); "Nicaragua conditions passing of Costa Rican vessels", *La Nación*, San José, 16 October 2005 (Annex 185); "Nicaragua demands a Visa and Passport on the River", *La Nación*, San José, 30 October 2005 (Annex 189).

[413] See for example the Affidavit of Pablo Gerardo Hernández Varela, 27 January 2006: CRM, Annexes, Vol 4, Annex 86; and Note from Mr. Jorge Lao Jarquín and Mr. Santos Arrieta Flores to Costa Rican Foreign Ministry, 22 November 2005: CRM, Annexes, Vol 6, Annex 238.

[414] Note from Mr. Jorge Lao Jarquín and Mr. Santos Arrieta Flores to Costa Rican Foreign Ministry, 22 November 2005: CRM, Annexes, Vol 6, Annex 238.

[415] Copies of the payment receipts for each visa, as well as of the visas themselves, are included in CRM, Annexes, Vol 6, Annex 244. See also the Affidavit of Carlos Lao Jarquín, 27 January 2006: CRM, Annexes, Vol 4, Annex 84.

4.13 In its Counter-Memorial, Nicaragua has not denied any of these facts nor responded to the evidence presented.

4.14 Costa Rica annexes to this Reply evidence that revenue from the imposition of a visa requirement is to be applied to finance Nicaragua's defence before this Court, which provides further support to Costa Rica's claim that this is a retaliatory measure. According to Nicaraguan Presidential Decree No. 97-2005, published in the Official Gazette No. 237 of 7 December 2005, revenue obtained from the consular visas charged to Costa Ricans would be destined to finance the costs of Nicaragua's defence in the proceedings instituted by Costa Rica in the present case.[417]

4.15 Costa Rica notes that in 2006 Nicaragua opened new Consulates in Puerto Viejo de Sarapiquí, in Limón, and in Ciudad Quesada. Limón is approximately 100 kilometres from Sarapiquí and Ciudad Quesada approximately 70 kilometres. However the Consulate in Sarapiquí does not operate regularly. Costa Ricans who wish to navigate on the San Juan are therefore still forced to travel to either Limón, Ciudad Quesada or San José, any of which would require a full day's journey, taking account of waiting time at the Consulate.

4.16 Further evidence annexed to this Reply affirms that the Nicaraguan authorities continue to require the carrying of a passport and Nicaraguan visa for navigation on the San Juan to the present day. A Costa Rican boatman whose 2001 statement described the hardships he faced in consequence of Nicaragua's restrictions[418] stated in a recent affidavit:

> "That since his last affidavit regarding the restrictions imposed by Nicaragua on Costa Rican navigation on the San Juan River, Nicaragua has imposed the obligation to carry a visa on Costa Ricans navigating the San Juan River. That this measure has harmed

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[416] See for example the following Affidavits in CRM, Annexes, Vol 4: Geovanny Navarro Garro (Annex 85); Santos Martín Arrieta Flores (Annex 87); Marvin Hay-Gonzalez (Annex 91); Armando Perla Pérez (Annex 92); Windel Hodgson Hodgson (Annex 93); and Daniel Reese Wise (Annex 95).

[417] Nicaraguan Presidential Decree No. 97-2005 of 2 December 2005, Nicaraguan Official Gazette No. 237 of 7 December 2005: CRR Annexes, Vol 2, Annex 70.

[418] See CRM, Annexes, Volume 4, Annex 83.

him as well as all other boatmen who obtain their living from the transportation of persons and tourists from Puerto Viejo de Sarapiquí to Tortuguero and other towns located in Costa Rican territory."[419]

Another Costa Rican boatman stated:

> "...since the month of November of two thousand five, when the Government of Nicaragua imposed a requirement for Costa Ricans to carry a passport with a Nicaraguan visa for the navigation on the San Juan River, he has seen the activity of transportation of tourists from Puerto Viejo de Sarapiqui to Barra del Colorado and the Tortuguero Channels in Costa Rican territory very gravely affected, to the point that he is near to abandoning his business as a result of those and other restrictions that Nicaragua has imposed on Costa Rican navigation."[420]

4.17 There are far-reaching consequences of these restrictions and charges for Costa Rican riparians. Since all persons are liable to comply with Nicaragua's requirements, priests visiting to give Mass in the local communities, doctors and medical personnel travelling to provide assistance to both Costa Rican and Nicaraguan residents of the Costa Rican bank and officials from Costa Rican health and social assistance authorities are all subjected to these obligations. The consequences for the provision of health and social assistance in these areas is described in more detail below.[421] A press report of 14 May 2007 explained that the restrictions have resulted in a loss of these services, including the provision of Mass:

> "123 days after Sandinista Daniel Ortega came to power in Nicaragua, the situation has become more stringent. Not even priests are able to say mass in the Costa Rican villages on the river margin, because they are charged $25 (¢13 thousand) every time they pass...
> It has been a year since Father Mario Chavarría, from Pital de San Carlos, last visited the Costa Rican communities on the banks of the San Juan River, because every time he visited the area he had to pay $25 (¢13 thousand).
> 'It has been a year since I last visited that area. On my last visit, an Immigration official told me I could pass, but that I would have to pay on my next visit,' said Chavarría. More than 40 families there cannot receive mass, and on Sundays, they must leave their homes very early to hear the word of God."[422]

There have also been reports that these restrictions have prevented doctors and the Red Cross from visiting these areas:

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[419] Affidavit of Jorge Manuel Lao Jarquin, 28 July 2007: CRR, Annexes, Vol 2, Annex 52.

[420] Affidavit of Carlos Lao Jarquín, 28 July 2007: CRR, Annexes, Vol 2, Annex 51.

[421] See this Reply, paragraphs 4.26-4.41.

[422] "Neighbours from the San Juan plea for help", *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

> "Small farmers that must navigate the San Juan almost every day, and are not required to pay that fee, are not happy either. 'There are towns by the San Juan where doctors and the Red Cross cannot go because they have to pay all that money,' they say."[423]

4.18 This situation and its impact on the local tourist and related commercial activities – on which many local families depend – was explained in a press report of 10 June 2007:

> "Until a year ago, hundreds of tourists rented boats in Puerto Viejo de Sarapiquí to go to the San Juan River, and after paying $7 at the Nicaraguan army post, they would head on to Tortuguero or Barra del Colorado… But that situation changed drastically overnight, and had immediate effects.
>
> According to Pablo Hernández, a local boatman, 'Tourists are now an endangered species' in this zone.
>
> The reason is financially simple. For the last year, Nicaragua has been charging $25 for a visa plus another $9 for a 'right of passage; along the San Juan.
>
> The results: now almost no one visits this border zone, a popular tourist destination for its incomparable natural beauty…
>
> 'We are going bankrupt. I used to transport tourists even four times a month and now I hardly do it once a month. Nobody wants to go to the San Juan because they must pay a lot of money,' complains Pablo Hernández.
>
> He says the drop in tourism also affects small entrepreneurs with cabins and restaurants along the Sarapiquí River, particularly those that are closer to the San Juan River, where nobody wants to go.
>
> 'I can assure you this town is dying ever since they started charging that US$34. This is outrageous because you must pay to go to Costa Rican towns,' said the owner of some of those cabins…
>
> Only very few visitors come here, for now, and most of them turn back because they refuse to pay the US$34 fee."[424]

(4) Timetables

4.19 In its Memorial, Costa Rica presented the following evidence:

(i) In 1999 Nicaraguan authorities imposed timetables on Costa Rican navigation on the River, only permitting navigation from 6am to

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[423] "$34 fee marks the end of local tourism", *La Nación*, San José, 10 June 2007: CRR, Annexes, Vol 2, Annex 60.

[424] "$34 fee marks the end of local tourism", *La Nación*, San José, 10 June 2007: CRR, Annexes, Vol 2, Annex 60. According to the National Institute of Statistics and Surveys, the poverty line in Costa Rica for the year 2007 is set at a monthly income of 43, 261 colones or approximately US$86.50. Any income below that amount reaches the poverty level. As has been stated, in the area of the San Juan River there is a high incidence of poverty. The cost of one journey on the San Juan River for any of those residents living below the poverty line could represent more than a third of their monthly income. It is clear that poor families in need of travel on the River simply cannot afford the charges imposed by Nicaragua.

5.30pm.[425] Costa Rica protested this measure,[426] but Nicaragua continued to prohibit navigation outside of those permitted times.

(ii) Costa Rica's Memorial annexed evidence as to the inconvenience this measure caused to Costa Ricans who need to use the River, particularly riparians who depend on the River as a means of transportation to obtain social and health services from the Costa Rican Government. These included statements of Costa Rican health authorities explaining that timetables have prevented some inhabitants of the region from travelling at night for emergency health-related matters,[427] as well as statements from teachers who attest that these restrictions have affected the provision of educational services.[428]

4.20 In its Counter-Memorial, Nicaragua did not deny that it has imposed timetables on Costa Rican navigation, nor did it present any evidence to contradict the evidence presented.

4.21 Since Costa Rica submitted its Memorial, Nicaraguan authorities have continued to impose timetables on Costa Rican navigation. Annexed to this Reply is evidence of this, including:

(i) new affidavits testifying that timetables for Costa Rican navigation on the San Juan are still in force;[429] and

(ii) a recent press note which states that Costa Rican navigation is now limited by a curfew of 5pm.[430]

(5) Searches

4.22 In its Memorial, Costa Rica presented the following evidence:

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[425] "San Juan: Calm and uneasiness", *La Nación*, San José, 4 July 1999: CRM, Annexes, Vol 5, Annex 155.

[426] Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: CRM, Annexes, Vol 3, Annex 71.

[427] See Affidavit by Sandra Díaz Alvarado: CRM, Annexes, Vol 4, Annex 100.

[428] See Affidavit by Diane Gómez Bustos: CRM, Annexes, Vol 4, Annex 101.

[429] See for example Affidavit of Víctor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

[430] "Neighbours from the San Juan plea for help", *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

(i) In the context of the civil war in Nicaragua in the early 1980s, Nicaraguan army officials started searching Costa Rican vessels and their passengers.[431] At the conclusion of the war searches ceased, but they resumed sporadically in 1998 after Nicaragua prohibited navigation by Costa Rican police.[432]

(ii) After Costa Rica filed the present Application, searches of Costa Rican vessels and their passengers increased and were accompanied by general harassment. Costa Rica's Memorial annexed evidence of this including an affidavit of a Costa Rican boatman stating that his passengers were regularly searched at the Nicaraguan Army Post at Boca Sarapiquí.[433] It also documented cases in Boca San Carlos where schoolchildren were searched,[434] boats and fishing implements were confiscated[435] and neighbours harassed by the Nicaraguan Army and Immigration authorities when they attempted to travel on the River.[436]

4.23 In its Counter-Memorial, Nicaragua did not deny that its authorities search Costa Rican vessels and their passengers, nor did it present any evidence to contradict the evidence presented in the Memorial.

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[431] See for example Affidavits of Marvin Hay-Gonzalez, 28 January 2006; CRM, Annexes, Vol 4, Annex 91; and Armando Perla Pérez, 28 January 2006: CRM, Annexes, Vol 4, Annex 92. See also "Nicas confiscate material from journalists on the San Juan ", *La Nación*, San José, 24 February 1983: CRM, Annexes, Vol 5, Annex 117; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Security, Angel Edmundo Solano, 7 June 1982: CRM, Annexes, Vol 6, Annex 223; Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note No. D.M.133-82, 8 June 1982: CRM, Annexes, Vol 3, Annex 41; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 5 July 1982: CRM, Annexes, Vol 6, Annex 224; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 13 July 1982: CRM, Annexes, Vol 6, Annex 225; Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note No. D.M. 126-82, 16 July 1982: CRM, Annexes, Vol 3, Annex 42; Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Ambassador to Costa Rica, Rogelio Ramírez Mercado, Note No. D.M. 014-83, 8 March 1983: CRM, Annexes, Vol 3, Annex 47.

[432] See for example "Charge for Ticos travelling on the San Juan reinstated", *El Nuevo Diario*, Managua, 7 May 2004: CRM, Annexes, Vol 5, Annex 180.

[433] See Affidavit of Santos Martín Arrieta Flores, 27 January 2006: CRM, Annexes, Vol 4, Annex 87.

[434] See Affidavit of Diane Gomez Bustos, 16 February 2006: CRM, Annexes, Vol 4, Annex 101.

[435] See for example Affidavits by Leonel Morales Chacón: CRM, Annexes, Vol 4, Annex 106; E[illegible]k Maikol Martínez López: CRM, Annexes, Vol 4, Annex 107; and Josefa Alvarez Aragón: CRM, Annexes, Vol 4, Annex 109.

[436] See Affidavits of Sandra Díaz Alvarado, 16 February 2006: CRM, Annexes, Vol 4, Annex 100; and Luis Yanan Corea Torres, 16 February 2006: CRM, Annexes, Vol 4, Annex 102.

4.24 Since the Memorial, the searches of Costa Rican vessels and passengers have continued and have indeed worsened. Costa Rica annexes the following evidence to this Reply:

(i) A Costa Rican preacher who needed to navigate the San Juan River on 19 March 2007 on a journey starting from Puerto Viejo de Sarapiquí, accompanying a group of American missionaries who were taking school and health articles to the communities of Tambor, Remolinito and Arbolito, all on Costa Rican territory, testifies that all passengers were searched and some of their belongings seized. He stated:

> "At the mandatory stop point that the Nicaraguan Army imposes at their Post at the mouth of the Sarapiqui River, the Nicaraguan military boarded the vessel to search all belongings, seizing from them photographic cameras and the passports of all the people travelling and threatening them that they would bring dogs to search if they were carrying other cameras. The seized articles were given back at their return."[437]

(ii) A boatman who previously navigated on the San Juan regularly testified that the gravity and intensity of the harassment faced by Costa Rican riparians has reached a level where most of them avoid navigation where possible. He stated:

> "…due to the restrictions that the Nicaraguans began to impose on Costa Rican navigation on the San Juan River, and mainly because of the verbal abuse to which they were being subjected each time they reported themselves to the Nicaraguan Army posts, he had avoided using the river, and because of that he had not visited his farm for about six months."[438]

Similarly, the following testimony was reported in a press note:

> "Jarmir Aguilar, who lives in Cureña, is a tenth grader from Boca de San Carlos. She must cross the river to go to school. 'If you are not seen on the other side, you will not have any problems,' said the girl."[439]

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[437] See Affidavit of Rodrigo Antonio Zamora Arroyo, 28 July 2007: CRR, Annexes, Vol 2, Annex 53.

[438] See Affidavit of Leonel Morales Chacón, 30 April 2007: CRR, Annexes, Vol 2, Annex 50.

[439] "Neighbours from the San Juan plea for help", *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

C. Breaches of Costa Rica's right of navigation "for purposes of commerce"

4.25 In its Memorial, Costa Rica demonstrated that its right of navigation "for purposes of commerce" includes navigation by Costa Rican government officials to provide essential services (including health, education and security) to the local population – a majority of whom are Nicaraguan.[440] It also demonstrated that local inhabitants have a perpetual right of free navigation for the purposes of communication between the villages and towns, or any other point on the Costa Rican bank, to any place on either bank of the River where navigation is common, or to the interior of Costa Rica.[441] It presented evidence that Nicaragua has violated these rights, including evidence of:

(i) Nicaragua's preventing Costa Rican judicial officials from navigating on the San Juan to carry out official duties on Costa Rican territory;[442]

(ii) Nicaragua's preventing Costa Rican technicians from the Programme of the Eradication of Screwworms from navigating on the San Juan to implement the Programme in the Costa Rican border zone;[443]

(iii) Nicaragua's preventing a judge, a fiscal agent, a public defender and two officials from the Judicial Investigation Organism from navigating on the San Juan en route to Fátima de Sarapiquí to investigate the death of an 11-month old child;[444]

(iv) the suspension, from November 2005, of the provision of domiciliary health services from the Costa Rican Social Security Office to certain local communities, resulting in the loss of primary health services for at least 164 inhabitants of the Costa Rican bank, including at least 23 children;[445]

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[440] See CRM, paras. 4.52-4.57, esp. 4.55-4.56.

[441] See CRM, para. 4.57.

[442] CRM, para. 5.100. See "Nicaragua would charge visa to Costa Rican policemen", *La Nación*, San José, 6 August 1998: CRM, Annexes, Vol 5, Annex 150; "Police were not allowed to navigate", *La Nación*, San José, 28 September 2000: CRM, Annexes, Vol 5, Annex 166; and "Energetic protest against Nicaragua" *La Nación*, San José, 29 September 2000: CRM, Annexes, Vol 5, Annex 167.

[443] CRM, para. 5.98. See Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, 7 September 1998: CRM, Annexes, Vol 3, Annex 52.

[444] CRM, para. 5.97. See "Nicaragua would charge visa to Costa Rican policemen", *La Nación*, San José, 6 August 1998: CRM, Annexes, Vol 5, Annex 150.

[445] CRM, para. 5.101. See the following correspondence: Director of the Health Area of Pital of San Carlos, Costa Rican Department of Social Security, Dr. Kattia Corrales Barboza, to Director of the Regional Management and Health Service Networks, North Huetar Region, Dr. Omar Alfaro Murillo, Note No. RHNPI-303, 7 November 2005: CRM, Annexes, Vol 6, Annex 236; Regional Director of the North Huetar Regional Medical Services, Dr. Omar Alfaro Murillo, to General Di-

(v) the detrimental effect Nicaragua's restrictions have had on the provision of educational services in the region.[446]

In general restrictions imposed by Nicaragua have prevented Costa Ricans from using the River as a waterway for communication.[447]

4.26 After Costa Rica filed its Application in September 2005, the situation for Costa Rican officials attempting to navigate on the San Juan deteriorated. Most importantly, due to Nicaragua's restrictions, Costa Rican health officials have been unable to provide health services to the communities on the Costa Rican bank of the River. It was in these circumstances that in May 2006 Dr. Thais Ching, Director of the Social Security's Health Area of Puerto Viejo de Sarapiquí, felt compelled to approach the Nicaraguan Consulate in Sarapiquí to request collaboration from the Nicaraguan authorities. Since 10 May 2006 Nicaraguan immigration officials had been preventing Costa Rica's Social Security health personnel from using the San Juan to travel to the communities of Tambor, Fátima and San Antonio to provide health services, as had been regularly done in the past. As is evidenced in Dr. Ching's Note of 14 June 2006 addressed to the Nicaraguan Consul at Ciudad Quesada, the Consul at Sarapiquí replied that she should go instead to the Consulate in Ciudad Quesada to make the request, and that the usual requirements to navigate on Nicaraguan territory are the carrying of a passport, visa and a payment of US$25 per person. In her Note to the Nicaraguan Consul at Ciudad Quesada, Dr. Ching complained that

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rector of Regional Management and Health Service Networks, Dr. Armando Villalobos Castañeda, Note No. DGRRSSRHN-2511-05, 15 November 2005: CRM, Annexes, Vol 6, Annex 237; and Head of the Nurse Department of the Health Area of Pital, Costa Rican Department of Social Security, Lic. Antonio García Pérez, to Director of the Health Area of Pital of San Carlos, Costa Rican Department of Social Security, Dr. Kattia Corrales Barboza, Note No. DAP-EA-030-2006, 9 February 2006: CRM, Annexes, Vol 6, Annex 239. See also Affidavit of Ana Gabriela Mazariegos Zamora, 14 February 2006: CRM, Annexes, Vol 4, Annex 98; Affidavit of Kattia Patricia Corrales Barboza, 16 February 2006: CRM, Annexes, Vol 4, Annex 99; and Affidavit of Sandra Díaz Alvarado, 16 February 2006: CRM, Annexes, Vol 4, Annex 100; Head of the Nursing Department of the Health Area of Pital, Costa Rican Department of Social Security, Lic. Antonio García Pérez, to Director of the Health Area of Pital of San Carlos, Costa Rican Department of Social Security, Dr. Kattia Corrales Barboza, Note No. DAP-EA-030-2006, 9 February 2006: CRM, Annexes, Vol 6, Annex 239.

[446] CRM, para. 1.02. See Affidavit of Diane Gómez Bustos, 16 February 2006: CRM, Annexes, Vol 4, Annex 101.

[447] CRM, para. 5.103. See, e.g., "Charge for Ticos travelling on the San Juan reinstated", *El Nuevo Diario*, Managua, 7 May 2004: CRM, Annexes, Vol 5, Annex 180; "Nicaragua conditions passing of Costa Rican vessels", *La Nación*, San José, 16 October 2005: CRM, Annexes, Vol 5, Annex 185; "Nicaragua conditions passing of Costa Rican vessels", *El Nuevo Diario*, Managua, 17 October 2005: CRM, Annexes, Vol 5, Annex 187.

the imposition of such requirements would endanger the lives of the inhabitants of those Costa Rican communities, many of them Nicaraguan:

> "We are hereby bringing to your attention the situation we have been facing since May 10, 2006. The Immigration officers at the Nicaraguan border post in the San Juan River are requiring from us that in order to continue with the medical tours on the river we must count with the approval of the Nicaraguan Vice-Consul in Sarapiquí.
>
> Therefore this Medical Office, through letter 275 – 2006, submitted a request for that permit to Mr. Duilio Hernández, Nicaragua's Vice-Consul in Sarapiquí.
>
> In his letter CNS 014/05/06, dated May 19, 2006, Mr. Hernández writes: '…In this respect, after the necessary consultations and inquiries with the immigration post mentioned by you as well as other competent authorities, I have been informed that if the Office under your honourable charge needs to use the San Juan River of Nicaragua to provide health services to the Costa Rican communities of Tambor, Fátima, and San Antonio, you must comply with the requirements that are normally established for the duly authorized entrance of foreign persons and vessels into Nicaraguan territory. Therefore, I must inform you that this Vice-Consulate is not in charge of granting navigation permits for vessels ….' (I enclose a copy of the letter).
>
> Later he told me by phone that the normal requirements to navigate through Nicaraguan territory are: passport, visa, and a fee of $ 25 per person.
>
> This measure harms the neediest people in that zone, who do not even have minimum health and education conditions and employment sources. We are talking of a total of 449 people, 123 families, 50% of which are from Nicaragua. Among these are 198 children between the ages of 0 and 9 years, 109 teenagers, 209 adults, and 23 senior citizens. This is also affecting the officers who work at the border post of the Nicaraguan Army in la Trinidad, to whom we have always provided our services whenever they have requested.
>
> Since this is a humanitarian matter, whose main objective is to provide medical services to all the border population, regardless of their migratory, economic, or social conditions, we are asking for your good offices so that our functionaries can continue providing medical attention in that zone, as has always been done. The team in charge of this mission includes: a doctor, a nurse's aide, a pharmacy technician, a technical assistant for primary care and a network clerk."[448]

4.27 In its Counter-Memorial, Nicaragua used Dr. Ching's affidavit in an attempt to show that Costa Rica has always requested permission to navigate the San Juan. It stated:

> "[c]onsistent with the 1858 Treaty and the Cleveland Award, Nicaragua has consistently required that those from Costa Rica obtain authorization to cross into her territory, whether on the San Juan or elsewhere. Costa Rica has repeatedly recognized this need to obtain permission."[449]

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[448] Director, Costa Rican Social Security Fund, Health Area Puerto Viejo de Sarapiquí, Dr. Thais Ching Zamora, to First Cónsul, Nicaraguan Consulate, Ciudad Quesada, Licenciado Mario Rivas Baldelomar, Note No. 346-2006, 14 June 2006: CRR, Annexes, Vol 2, Annex 44.

[449] NCM, para. 6.2.11

The Counter-Memorial then cites Dr. Ching's note of 19 June 2006, in which she apparently requested Nicaragua's permission to navigate the San Juan River to provide healthcare services to the communities of Tambor, Fátima and San Antonio, as purported proof of Costa Rica's "consistent" practice of requesting permission.[450]

4.28 The truth of the matter is that Dr. Ching was compelled by the Nicaraguan Ambassador in Costa Rica to modify her original request, in a manoeuvre devised by Nicaragua to create "evidence" to support its unfounded claim. As can be clearly seen in Dr. Ching's Note of 14 June 2006 to the Nicaraguan Consul at Ciudad Quesada extracted above, her original request was for "collaboration".[451] After the Nicaraguan Consul at Sarapiquí denied to assist in facilitating navigation for the health officials, she had to turn to the Nicaraguan Consul at Ciudad Quesada, who in turn made her go to the Nicaraguan Embassy in San José. There, the Nicaraguan Ambassador himself told Dr. Ching that if she wanted assistance she would have to modify her Note so that it expressly stated that she was asking for "authorization" as it is stated in her Note of 19 June 2006, which Nicaragua annexed to its Counter-Memorial.[452]

4.29 Dr. Ching explained these incidents in a statement given under oath on 8 August 2007. She stated:

> "SECOND: She continues stating that she knows that the care activities are carried out with particular consideration at the border areas of Costa Rica, in the vicinity of the San Juan River, given the special conditions of poverty, vulnerability and distance of those communities, among other those of Tambor, Remolinito, San Antonio and Fatima, all located on the right bank of the San Juan River, in Costa Rican territory. That she knows that from time immemorial the health workers of Costa Rica have travelled to those communities by the San Juan River, as this is the only way to communicate to those places, and that during all this time, including the years two thousand and four and two thousand and five when she was in charge of that area, they were never required to request permission to conduct said navigation.
> THIRD: That on ten May two thousand and six, the Nicaraguan Military informed them that from that day on the usual navigation on the San Juan River to Costa Rican health workers was prohibited and that in order for these health workers to navigate, they had to go to the Nicaraguan Consulates in Costa Rica to obtain a Nicaraguan

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[450] NCM, para. 6.2.12, citing NCM, Vol II, Annex 51

[451] Director, Costa Rican Social Security Fund, Health Area Puerto Viejo de Sarapiquí, Dr. Thaís Ching Zamora, to First Cónsul, Nicaraguan Consulate, Ciudad Quesada, Licenciado Mario Rivas Baldelomar. Note No. 346-2006, 14 June 2006: CRR, Annexes, Vol 2, Annex 44.

[452] NCM, Vol II, Annex 51.

> visa. She states that given the vulnerability and exposure to infectious-contagious diseases of those populations, among others malaria and dengue, and the chance that there could be a sanitary crisis outbreak that could threaten the lives of many people, the Health Area decided to contact the Nicaraguan authorities in Costa Rica to find a solution. For this purpose she sent notes to Nicaragua's Vice-consul in Puerto Viejo de Sarapiqui, and later to Nicaragua's Vice-consul in Ciudad Quesada, requesting the collaboration to conduct visits to the populations adjacent to the San Juan River. She continues stating that the Nicaraguan Vice-consul in Ciudad Quesada informed her that she had to request a special permit before the Nicaraguan Embassy in Costa Rica. Accordingly, she visited the Nicaraguan Ambassador in Costa Rica at his office, to whom she requested the collaboration, in the same terms that she had done before the Vice-consuls. Whilst thinking that she would get a favourable answer given the imperative need to provide the urgent health services, nevertheless, the Ambassador told her that in order to analyze the request, she had to change the term 'Request for collaboration' to 'Request of Authorization to navigate the San Juan River,' otherwise her request would not be processed. He also informed her that her petition would be resolved by the Ministry of Foreign Affairs of Nicaragua.
> FOURTH: She says that her job is not to make considerations of legal character, and that given the imperative need to provide urgent services to the populations in order to safeguard the health and the lives of people, particularly of children and other social groups in risk in the area of the San Juan River, she wrote the note under the terms demanded by the Ambassador, all done as a result of the urgent state of necessity, given the aforesaid imminent sanitary risks."[453]

4.30 Dr. Ching's testimony and note demonstrate that Costa Rican health authorities did in fact navigate without restrictions in the past and that it was not until May 2006 that Nicaragua began to demand permits for such navigation. It describes how Nicaraguan consular and diplomatic authorities manipulated her desperate situation to produce the "evidence" later used in Nicaragua's Counter-Memorial.

4.31 Other Costa Rican Government institutions have also suffered because of Nicaragua's recent restrictions. Such is the case of the Ministry of Health, whose officials from the Sarapiquí Sector Health Area and the Program for Nutrition Centres used to navigate on the San Juan River twice a month to provide services in basic health care as well as to deliver food, education and other services to the communities on the San Juan border zone. Since the middle of 2006 their navigation has been impeded by Nicaragua, generating great concern because of the importance of these services for the inhabitants of the border communities. This situation prompted Costa Rica's Foreign Minister to write a note to the Nicaraguan Minister of Foreign Affairs on 14 August 2006 in which, appealing to humanitarian reasons, he urged Nicaragua to lift those restrictions. The note stated:

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[453] Affidavit by Dr. Thais Ching Zamora, 8 August 2007: CRR, Annexes, Vol 2, Annex 55.

> "Because of this, Excellency, aside from the positions of our countries with respect to the subject of Costa Rican navigation on the San Juan River, my Government respectfully urges the Illustrious Government of Nicaragua to eliminate the restrictions imposed for the navigation of Costa Rican authorities of the Ministry of Health in that river, so that the integrity and health of the people of that zone will not be affected, who in their majority belong to very poor families. My Government trusts that Your Excellency and the Illustrious Government of Nicaragua understand the human significance of this situation, and will agree to take the necessary steps to solve it."[454]

4.32 As can be seen, Costa Rica was careful to indicate that such request was made "aside from the positions of our countries with respect to the subject of Costa Rican navigation on the San Juan River," not only to be consistent with its previous statements about the issues in dispute before this Court but also to give Nicaragua an opportunity to resolve the situation on humanitarian grounds without its position in respect of this dispute being affected. Nicaragua did not respond to this note and the restrictions on Costa Rican navigation remain in force to the present day.

4.33 The lack of medical services to those border communities clearly raises the risk of sanitary outbreaks. For example, a recent outbreak of leptospirosis on Nicaraguan territory — resulting in nine persons dead and some 1500 infected — caused concern for Costa Rican health authorities, particularly in the northern border zone.[455]

4.34 Another Costa Rican Government institution whose work has been gravely affected by Nicaraguan restrictions on the San Juan is the Joint Institute for Social Assistance (IMAS), which in the past navigated on the San Juan River to reach poor families living on the Costa Rican bank — many of whom are of Nicaraguan origin — in order to bring financial aid so that their children can have access to education. In light of Nicaragua's restrictions, local personnel of the IMAS have been placed in the position of having to request permission on the terms dictated by Nicaraguan authorities. On 14 August 2007 Mr. Marvin Chavez Thomas, Regional Manager of the IMAS in San Carlos, sent a Note to the Nicaraguan Consul in Ciudad Quesada, Mr. José Reinaldo Rodríguez Lindo, requesting permission for the IMAS personnel to navigate the San Juan River in order to provide financial assistance so that children in those communities could attend lessons at the Boca San Carlos high school. As he explained in his Note, due to heavy rains in the area, the roads were destroyed and the only way to reach the area was using the River.[456]

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[454] Costa Rican Foreign Minister, Bruno Stagno Ugarte, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-254-06 of 14 August 2006: CRR, Annexes, Vol 2, Annex 45.

[455] "Health Authorities Watch the Northern Border for Leptospirosis" *La Nación*, San José, 30 October 2007: CRR, Annexes, Vol 2, Annex 62.

4.35 Mr. Chavez made the following statement in an affidavit annexed to this Reply:

> "…in the region that his Institute operates, the Costa Rican communities along the bank of the San Juan River are among the poorest and most vulnerable in the country, particularly because of the high number of Nicaraguan families resident there who have children born in Costa Rica, which make up the majority of the population in said area, which IMAS assists. …before the year two thousand six, IMAS personnel visited those communities using the San Juan River without requesting for permission. However… the Nicaraguan authorities have been requiring that Costa Rican officials request permission in order to visit and aid those communities… …Given the urgent need for IMAS to provide economic support to poor people in those communities, and in particular to support the children in those communities financially, so they can receive basic primary and secondary education, IMAS was placed in a position where it needed to request the authorization demanded by the Nicaraguan authorities to navigate the river, as there is no other means to reach those communities."[457]

4.36 Mr. Chavez indicates in his affidavit that he did not receive a reply from the Nicaraguan authorities.[458] On other occasions, however, the Nicaraguan authorities have responded quite quickly to Costa Rican requests for permission to navigate. For example on 22 May 2007 the Coordinator of the Northern Regional Office of the Costa Rican Ombudsman's Office, Ms. Laura Navarro, was also compelled to send a note to the Nicaraguan Consul in Ciudad Quesada, Mr. Mario Rivas, to request "authorization" for IMAS officials who would be participating in a regional Environment and Health Fair that was to be held by the high school of Boca San Carlos, and who intended to take the opportunity to visit poor families in the communities of Boca San Carlos and La Cureña. Ms.

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[456] IMAS Regional Manager in San Carlos, Marvin Chavez Thomas, to Nicaraguan Consulate at Ciudad Quesada, José Reinaldo Rodríguez Lindo, Note GRHN-188-08-07, 14 August 2007: CRR, Annexes, Vol 2, Annex 49.

[457] Affidavit by Marvin Chavez Thomas, 5 November 2007: CRR, Annexes, Vol 2, Annex 56.

[458] Affidavit by Marvin Chavez Thomas, 5 November 2007: CRR, Annexes, Vol 2, Annex 56.

Navarro's request indicated that for these purposes the IMAS personnel needed to navigate on the San Juan on May 25, 26, and 27.[459]

4.37 Nicaragua responded to Ms. Navarro on 25 May 2007 in a note signed by Mr. Emilio Rappaccioli Pasos, Minister Counsellor at Nicaragua's Embassy in San José. The relevant parts of Mr. Rappaccioli's note read as follows:

> "After this Embassy consulted with the Nicaraguan Ministry of Foreign Affairs, we extend a special authorisation to navigate the San Juan of Nicaragua River for the aforementioned purposes and it cannot be used for any other purposes or places different from the aforesaid ones, or in violation of Nicaragua's full sovereignty over the River.
>
> This permit is a gesture of friendship, good neighbour policy, and good faith courtesy and it cannot be used in any other way or with purposes which are harmful to Nicaragua in any way or circumstance.
>
> This permit will be valid only for the 25th, 26th and 27th of May, 2007."[460]

4.38 It can be observed that, according to Nicaragua's response, the IMAS personnel could only visit the Costa Rican communities of Boca San Carlos and La Cureña, and only on the days indicated in the Note. In other words, the capacity of Costa Rican authorities to visit their own country in the places and at a time of their choosing is being limited by Nicaragua. It is revealing that Nicaragua's "permit" is described as "a gesture of friendship, good neighbour policy and good faith courtesy," rather than in accordance with Costa Rica's perpetual right of free navigation on the San Juan River. Finally, according to Nicaragua, each time Costa Rican officials must use the San Juan River to discharge their missions, they must obtain "special authorization" from the Nicaraguan Foreign Ministry in Managua and cannot be authorised by any other, more accessible Nicaraguan official.

4.39 Mr. Rappaccioli's note was accompanied by a document issued by the Nicaraguan Embassy in San José, entitled "Authorization for Navigation," which stipulated that:

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[459] Coordinator of the Northern Regional Office of the Ombudsman's Office, Licda. Laura Navarro Rodriguez, to Consul of Nicaragua at Ciudad Quesada, Mario Rivas, Note No. DHR-RN-051-2007, 22 May 2007: CRR, Annexes, Vol 2, Annex 46.

[460] Nicaraguan Minister Counsellor, Emilio Rappaccioli, to Coordinator of the Northern Regional Office of the Ombudsman's Office, Licda. Laura Navarro Rodríguez, Note No. ENCR/NF/EN/133/2007, 25 May 2007: CRR, Annexes, Vol 2, Annex 47.

> "Nicaraguan authorities have the Right to cancel this permit in case of a violation of the laws of the Republic of Nicaragua. Also, the bearers of this permit should undergo routine checks from the corresponding authorities."[461]

4.40 As can be seen, Nicaragua once again took the opportunity to establish new and unilateral conditions for Costa Rican navigation on the River, in an attempt to profit as much as possible from Ms. Navarro's request for "authorization" for navigation. It is clear that this request was only made in the context of recent Nicaraguan restrictions on Costa Rican navigation and the urgent need of Costa Rica's health and social assistance authorities to provide assistance to residents of the border zone. This is confirmed in an affidavit of Ms. Laura Navarro:

> "…as a result of the recent prohibition imposed by Nicaragua upon Costa Rican public workers to continue navigating the San Juan River, some institutions in charge of social security and the improvement of the living conditions of the inhabitants are no longer visiting some of the communities located on the Costa Rican bank of the San Juan River, given that navigation on the river is the only means to reach them. As a result of the danger that those communities face because they have no access to those services, a Health and Environmental Fair was planned, to take place in the area of Boca de San Carlos, including a visit to some of those communities. In order to secure the access of the Costa Rican workers to those isolated communities, and as a result of Nicaragua's demands for the request of permits, a request to the Nicaraguan Consulate on twenty two May two thousand and seven was made, so that the workers from the Joint Institute for Social Assistance could take financial assistance to the families living in the communities in the area of Cureña, at the Costa Rican bank of said river. …on twenty five May two thousand and seven she received an authorization from the Nicaraguan Embassy in Costa Rica, and not by the Consul, to whom she had originally sent the request. Despite having received the authorization, the trip was suspended due to weather conditions in the zone."[462]

4.41 The experiences of Costa Rica Government officials described above show that before the middle of 2006, Nicaragua did not require those officials to request permission to navigate on the River. They also indicate that Nicaragua has shown no consideration at all for the lives or well-being of the residents of the area, including the numerous Nicaraguans who benefit from Costa Rican health and social services; but that it has attempted to use these situations to its own advantage, and in particular to obtain evidence which it has presented before this Court.

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[461] Nicaraguan Embassy in Costa Rica, "Authorization to navigate", given to the Ombudsman's Office and the Ministry of Health Personnel, 25 May 2007: CRR, Annexes, Vol 2, Annex 48

[462] Affidavit by Laura Navarro Rodríguez, 6 November 2007: CRR, Annexes, Vol 2, Annex 57.

4.42 Since the Memorial, the situation has also deteriorated for Costa Rican boatmen and riparians seeking to exercise Costa Rica's perpetual right of free navigation for communication purposes. Currently they are at the mercy of the will and mood of the Nicaraguan military and immigration officials who control the San Juan River and who feel they have the power to dictate rules and restrictions as they please. For example a group of missionaries who needed to navigate on the River starting from Puerto Viejo de Sarapiquí on 19 March 2007 to distribute school and health articles to the communities of Tambor, Remolinito and Arbolito, all on Costa Rican territory, were prevented by the military from visiting Arbolito. The missionary Rodrigo Antonio Zamora Arroyo affirmed under oath the following:

> "That in his condition as preacher of a Christian organization, he carries out charity activities for children of poor communities along the border area of Costa Rica, specifically in the towns of Tambor, Remolinito and Arbolito, the first two on the right bank of the San Juan River. The town of Arbolito is located at the bank of the Sarapiqui River, also in Costa Rican Territory.
> SECOND: That on nineteen March two thousand and seven, he accompanied a group of missionaries taking with them school and health articles to the communities of Tambor and Remolinito. At the mandatory stop point that the Nicaraguan Army imposes at their Post at the mouth of the Sarapiqui River, the Nicaraguan military boarded the vessel to search all belongings, seizing from them photographic cameras and the passports of all the people travelling and threatening them that they would bring dogs to search if they were carrying other cameras. The seized articles were given back at their return. Additionally, they only allowed them to visit the town of Remolinito, and prohibited them from visiting the town of Tambor, which is also in Costa Rican territory."[463]

As can be seen once again, the Nicaraguan authorities consider that they have the power to limit Costa Rican navigation as they please, in this case preventing the missionaries from visiting one particular town in Costa Rican territory.

4.43 The case of this preacher was also used by Nicaragua in its Counter-Memorial to attempt to prove Costa Rica's "regular and consistent practice" of requesting permission to navigate the San Juan.[464] As was the case for Dr. Ching,[465] the truth is that this missionary had no choice but to request permission on the terms dictated by the Nicaraguan authorities. Evidently this purported request of "authorization" does not demonstrate a "regular and consistent practice" of requesting permission: it is an isolated case that occurred in the context of increased Nicaraguan restrictions after Costa Rica filed its Application. It is clear evidence of the retaliatory measures Nicaragua has taken against those Costa Ricans who wish to navigate on the San Juan River for the purposes of communication, as well as of the dire straits that these people find themselves when they seek to carry out their duties.

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[463] Affidavit of Rodrigo Antonio Zamora Arroyo, 28 July 2007: CRR, Annexes, Vol 2, Annex 53.

[464] NCM, para. 6.2.13, citing NCM, Vol II, Annex 53.

[465] See above, paragraphs 4.26-4.30.

4.44 Not only do the Nicaraguan authorities in the border area consider that they have the power to limit navigation by Costa Ricans by restricting the Costa Rican territory they can visit while navigating on the San Juan; they have also limited the amount of time they can stay on Costa Rican territory. Mr. Jorge Lao Jarquín, a Costa Rican boatman, described the following incident:

> "…on the thirty first of June of two thousand and six, when he was transporting missionaries carrying with them schooling material and health articles for the children of Remolinito, in Costa Rican territory, the Nicaraguan Military located in Boca de Sarapiqui ordered them that they could only stay for two hours in said town."[466]

4.45 That Costa Ricans are subject to the arbitrary wishes of the Nicaraguan authorities stationed at the Army and Immigration posts along the San Juan River is a fact. Costa Rica's Memorial included numerous affidavits and press reports to this effect. Nicaragua has not denied any of the incidents described in Costa Rica's Memorial.

4.46 The hardships currently faced by Costa Rican riparians were confirmed in an affidavit given on 28 July 2007.[467] One witness stated the following:

> "…until today, the Nicaraguan authorities at the San Juan River post in this area continue to impose restrictions on Costa Rican free navigation on the San Juan River, to wit: the flying only of the Nicaraguan flag on Costa Rican vessels to be able to navigate the River; the payment of taxes, particularly for those Costa Ricans who do not live in the zone; all children travelling to school must report like all other Costa Ricans travelling through the River; the imposition of timetables only on Costa Rican vessels; search and inspections of private property; the prohibition on some Costa Rican riparians to

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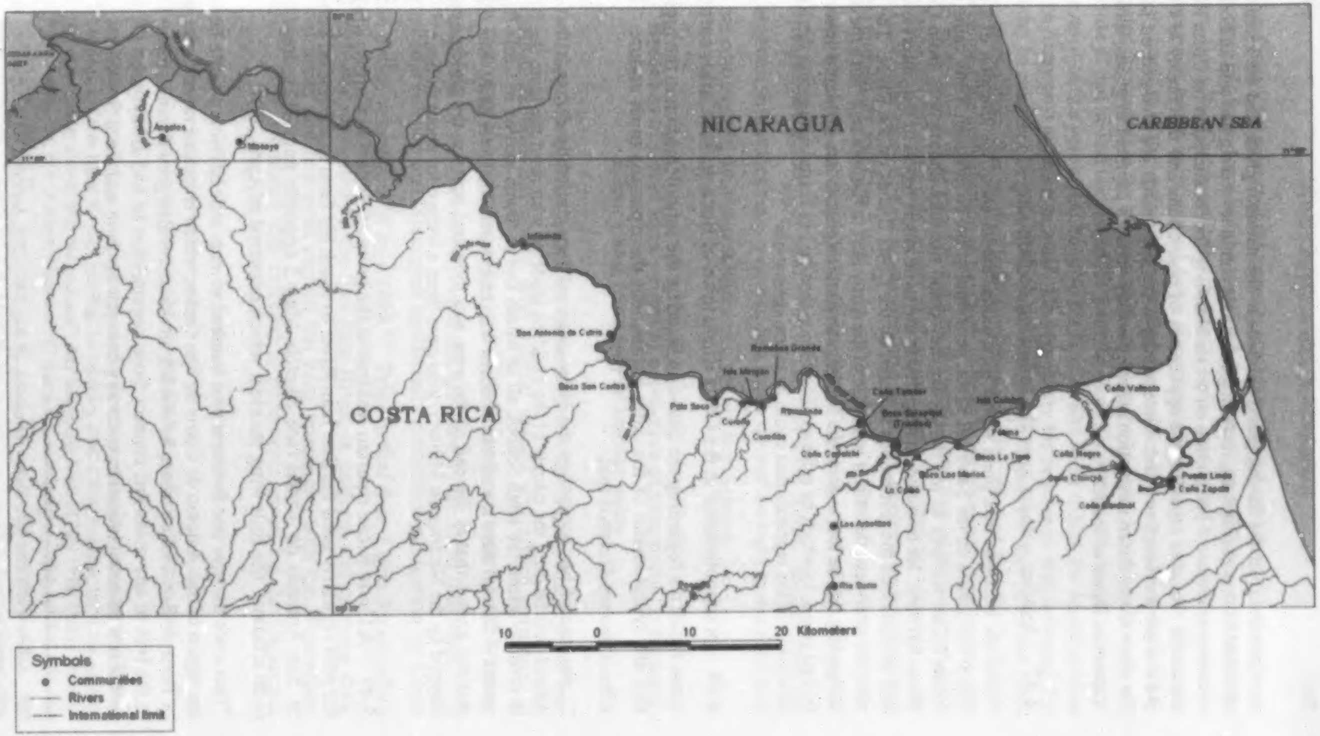
[466] Affidavit of Jorge Manuel Lao Jarquín, 28 July 2007: CRR, Annexes, Vol 2, Annex 52.

[467] Affidavit of Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

Sketch map 3

COSTA RICAN COMMUNITIES CONNECTED BY THE SAN JUAN RIVER


NICARAGUA
CARIBBEAN SEA
COSTA RICA
San Antonio de Cutris
Boca San Carlos
Palo Seco
Remolino Grande
Isla Morgan
Cureña
Cureñita
Remolinito
Caño Tambor
Boca Sarapiquí
(Trinidad)
Caño Copalchí
La Ceiba
Boca Las Marías
Los Arbolitos
Río Sucio
Isla Caballo
Fátima
Boca La Tigra
Caño Vallecito
Caño Negro
Caño Chirripó
Caño Sardinal
Puerto Lindo
Caño Zapote
Angeles
10
0
10
20 Kilometers
Symbols
Communities
Rivers
International limit

> navigate the river for having given opinions to the national press, and the seizure of artisanal fishing implements, including boats. He continues stating that said authorities continue to impose a prohibition on artisanal fishing for consumption on Costa Rican riparians. He also says that the application of restrictions and the threats to Costa Ricans are increased or made more severe when the guards are changed on posts. To allow Costa Rican navigation sometimes they demand payment in goods, through cigarettes, liquor or food."[468]

4.47 Another witness gave the following declaration:

> "...on the occasion of a press report by national media about the situation of Costa Rican navigation on the San Juan River, personnel of the Nicaraguan Army came into Costa Rican territory to tell the media they could not take photographs from Costa Rican territory. He continues stating that in the same media report he was interviewed, and he described the restrictions suffered by the Costa Ricans on the River. The day after the interview, the officer in charge of the Army post in the area sent him a message telling him that he had to go to the Nicaraguan post to speak to him about the interview he had given, to which he refused. Ever since then he has feared navigating the River as a result of the reprisals that could be taken against him."[469]

4.48 A schoolteacher in the Costa Rican town of Boca de San Carlos narrated some incidents regarding the situation faced by the schoolchildren in the region, that are symptomatic of the daily harassment the riparians must endure. The schoolteacher declared that:

> "...because of her occupation the Nicaraguan military constantly demands that she submit lists bearing the names of the children students who must navigate the River in order to attend the High School, all of whom live in towns located in Costa Rican territory. In total there are sixteen children who must travel the River daily. She states that she knows that at the end of the year two thousand and six, the children were stopped by the Nicaraguan Military, who gave them a lecture for about an hour."[470]

4.49 A Costa Rican riparian resident in the town of Boca San Carlos, who in the past regularly used the San Juan River to reach his farm in the region known as San Antonio de Cutris (see Sketch Map 3 opposite page 712), described in an affidavit the following incident which occurred in April 2007:

> "That since the year one thousand nine hundred seventy nine he owns a cattle farm in the region of San Antonio de Cutris de San Carlos, which is located towards the west of Boca de San Carlos, where he resides, in which he also grows some crops. Due to the lack of any roads that connect those communities he had always used the San Juan River as communication waterway between his farm and Boca San Carlos. ...

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[468] Affidavit of Víctor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

[469] Affidavit of Mario Salas Jiménez, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

[470] Affidavit of Marleny Rojas Vargas, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

> before Costa Rica presented the case against Nicaragua he used to travel almost once a week to his farm, for which he took his boat, reported to the Army and MARENA post in Boca San Carlos, and went to San Antonio. …due to the restrictions that the Nicaraguans began to impose on Costa Rican navigation on the San Juan River, and mainly because of the verbal abuse to which they were being subjected each time they reported themselves to the Nicaraguan Army posts, he had avoided using the river, and because of that he had not visited his farm for about six months. However, on twenty-four April of this year he had to go to his farm to take some calves, for which he went to the Army post to report himself. He says that to his surprise he was informed that that day he could not be granted the authorization to navigate, and that he should come back in two days, that is, on Thursday twenty-six. He returned that day and again was refused the authorization to navigate, without being given any explanation, as a result he deemed it prudent not to insist on the subject, and thus he had to return to his residence without being able neither to go to his farm nor to transfer his cattle. …he knows of other cases of neighbours who also have had problems transporting their cattle through the San Juan River."[471]

As described in this statement, Costa Rican riparians are at the mercy of the Nicaraguan authorities who control the San Juan River. In this case the Nicaraguan authorities simply denied this cattle farmer the right to use the River for his commercial activities without giving any explanation.

D. Breaches of Costa Rica's right of protection of commerce, safeguard, defence and re-supply of border posts

4.50 In its Memorial, Costa Rica demonstrated that its perpetual right of free navigation includes navigation with official vessels and armed personnel in order to protect its commercial navigation, in accordance with the 1858 Treaty as interpreted by the Cleveland Award and affirmed by the 1916 Judgment.[472] It presented evidence that Nicaragua unilaterally prohibited navigation by Costa Rican police vessels on 14 July 1998.[473] Prior to that date, Costa Rican police had regularly navigated on the San Juan River, in uniform and carrying their normal arms, and had even carried out joint operations with the Nicaraguan Army.[474] The Memorial also referred to statements given by the Nicaragua

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[471] Affidavit of Leonel Morales Chacón, 30 April 2007: CRR, Annexes, Vol 2, Annex 50.

[472] CRM, para. 4.96.

[473] See Note of the Intendent Commander in service of Atlantic Command, Sarapiqui, Daniel Soto Montero, to Costa Rican Foreign Ministry, 14 February 2006: CRM, Annexes, Vol 6, Annex 240. See also "Border dispute with Nicaraguans", *La Nación*, San José, 16 July 1998: CRM, Annexes, Vol 5, Annex 131; and "Alemán: Ticos out", *El Nuevo Diario*, Managua, 17 July 1998: CRM, Annexes, Vol 5, Annex 132.

[474] See the following Affidavits in CRM, Annexes, Vol 4: Carlos Luis Alvarado Sánchez (Annex 88); Daniel Soto Montero (Annex 89); Luis Angel Girón Angulo (Annex 90); José Granados Montoya (Annex 94); Ruben Lao Hernández (Annex 103); and Victor Julio Vargas Hernández (Annex 105).

President in October 2005, threatening to use force in order to prevent Costa Rican police from navigating on the River.[475]

4.51 This prohibition is still in force and has caused many problems for the Costa Rican police, for whom the tasks of supplying and relieving their police posts and visiting the local communities to provide security have become extremely difficult. In 1999 the Costa Rican police post in La Cureña, on the right bank of the San Juan, had to be closed because of the impossibility of access by land and Nicaragua's prevention of access by the River. Costa Rica's Memorial demonstrated how the Costa Rican inhabitants of the San Juan border region have seen their security greatly weakened and have repeatedly voiced those concerns.[476] The nation's security has also been weakened since the capacity of the Costa Rican police to combat trans-border crimes such as drug and arms trafficking has suffered.[477]

4.52 Annexed to this Reply is further evidence that Nicaragua continues to prevent Costa Rican police from navigating on the San Juan with their normal arms. In fact Nicaragua has authorised its Army officials to detain Costa Rican armed personnel. A Nicaraguan Presidential Decree entitled "The Government of Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan Territorial Waters," was approved on 28 September 2005 and published the following day. It states:

> "Article 1. – The Government of the Republic of Nicaragua will not allow armed navigation of foreign forces in national waters, as it is a flagrant violation of national sovereignty, the Political Constitution, and the law.
> Article 2. – The Nicaraguan Army is ordered to immediately increase its presence and permanent surveillance at the San Juan River in order to prevent, with all the means provided to it by national legislation, the transit of armed personnel, the relief and the transportation of weapons, ammunition and supplies, by foreign forces, as well as any other activity related to the illicit trafficking of arms in all of its aspects.

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[475] See CRM, para. 5.136.

[476] See "Intense arms control", *La Nación*, San José, 25 September 2000: CRM, Annexes, Vol 5, Annex 165; "Neighbours in the San Juan River feel defenceless", *La Nación*, San José, 22 June 2002,: CRM, Annexes, Vol 5, Annex 177; "San Juan: Calm and uneasiness", *La Nación*, San José, 4 July 1999: CRM, Annexes, Vol 5, Annex 155; and "San Juan spices up relationship with Nicaraguans", *La Nación*, San José, 10 July 2000: CRM, Annexes, Vol 5, Annex 164.

[477] "Vessels investigated", *La Nación*, San José, 17 January 1999: CRM, Annexes, Vol 5, Annex 154; "The Northern Border: An open door for drug dealers", *La Nación*, San José, 13 June 2005: CRM, Annexes, Vol 5, Annex 181; and "Intense arms control", *La Nación*, San José, 25 September 2000: CRM, Annexes, Vol 5, Annex 165.

Article 3. – The Ministry of the Interior, through the National Police Department, is ordered to proceed immediately to confiscate all the arms that are seized and take the offenders before the Nicaraguan Courts of Justice so they can be tried with the full severity of the law for the crimes they may have committed."[478]

E. Breaches of Costa Rica's related rights

(1) Flags

4.53 In its Memorial, Costa Rica presented the following evidence:

(i) After Nicaragua prohibited Costa Rican police navigation in July 1998, Nicaraguan authorities began forcing Costa Rican boatman to carry the Nicaraguan flag in order to navigate on the River.[479] Costa Rica protested this measure[480] and, after an exchange of diplomatic notes, the restriction was no longer implemented.

(ii) In October 2005, after Costa Rica filed its Application in the present case, Nicaraguan authorities again required Costa Rican vessels to carry a Nicaraguan flag.[481] Costa Rica's Memorial annexed numerous statements of Costa Rican boatmen and riparians describing this measure and the problems it caused.[482]

4.54 In its Counter-Memorial, Nicaragua does not deny that it requires Costa Rican vessels to fly a Nicaraguan flag in the San Juan. Instead it asserts a right to impose such a requirement – although it does so without any supporting evidence, and in the face of more than a century of Costa Rican navigation on the River without flying the Nicaraguan flag. There is no international obligation to fly the flag of the territorial State when exercising a conventionally guaranteed perpetual right of free navigation in an international watercourse unless the contrary is expressly provided for in the relevant convention.[483]

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[478] Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, published Nicaraguan Official Gazette No. 188 of 29 September 2005: CRR, Annexes, Vol 2, Annex 69.

[479] See "Nicaraguan hostility worsens", *La Nación*, San José, 4 August 1998:CRM, Annexes, Vol 5, Annex 147; "Commerce decreases along the border", *La Nación*, San José, 27 September 1998: CRM, Annexes, Vol 5, Annex 152. See also the Affidavit of 5 May 2001: CRM, Annexes, Vol 4, Annex 83 and the Affidavit of Santos Martín Arrieta Flores, 27 January 2006: CRM, Annexes, Vol 4, Annex 87.

[480] Costa Rican Foreign Minister Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-[illegible]37-2001, 9 May 2001: CRM, Annexes, Vol 3, Annex 71.

[481] See the following press notes: "Nicaragua conditions passing of Costa Rican vessels", *La Nación*, San José, 16 October 2005: CRM, Annexes, Vol 5, Annex 185; "Costa Rican vessels will bear the Nicaraguan flag", *La Prensa de Nicaragua*, Managua, 17 October. 2005: CRM, Annexes, Vol 5, Annex 186; "Nicaragua conditions passing of Costa Rican vessels", *El Nuevo Diario*, Managua, 17 October 2005: CRM, Annexes, Vol 5, Annex 187; and "Costa Rican Foreign Affairs Minister seeks dialogue regarding visas and flags ", *El Nuevo Diario*, 1 November 2005: CRM, Annexes, Vol 5, Annex 190. See also note from Municipal Mayor of San Carlos, Costa Rica, Lic. Alfredo Córdoba Soro, to Director of Foreign Policy, Costa Rican Foreign Ministry, Lic. José Joaquin Chaverri Sievert, Note No. AM-1315-2005, 18 October 2005: CRM, Annexes, Vol 6, Annex 235. See also Affidavit of José Moreno Rojas, 16 July 2006: CRM, Annexes, Vol 4, Annex 108.

[482] See the following affidavits in CRM, Annexes, Vol 4: Carlos Lao Jarquin (Annex 84); Geovanny Navarro Garro (Annex 85); Pablo Gerardo Hernández Varela (Annex 86); Santos Martín Arrieta Flores (Annex 87); Marvin Hay-Gonzalez (Annex 91); Daniel Reese Wise (Annex 95); Diane Gómez Bustos (Annex 101); and José Moreno Rojas (Annex 108).

4.55 New affidavits annexed to this Reply confirm the Nicaraguan authorities continue to require Costa Rican vessels to fly the Nicaraguan flag.[484]

(2) Fisheries

4.56 In its Memorial, Costa Rica presented evidence that after Costa Rica filed the present Application in September 2005 Nicaraguan authorities began to prevent Costa Rican riparians from their traditional practice of fishing for subsistence purposes. Costa Rica's Memorial annexed numerous affidavits proving this fact and describing the difficulties experienced by Costa Rican riparians as a result of this measure.[485]

4.57 Despite the evidence presented by Costa Rica, Nicaragua claims in its Counter-Memorial that it has not prevented fishing by Costa Ricans for subsistence purposes, stating:

> "Nicaragua wishes to make quite clear that notwithstanding its rights over the San Juan River, it has never ordered the prevention of fishing for subsistence purposes by Costa Rican riparians… What Nicaragua does not accept is that she has prevented fishing for subsistence purposes even for the short period involved since the instituting of these proceedings in September 2005".[486]

Nicaragua's Counter-Memorial does not contain any evidence in support of its claim, nor does it contain any evidence contradicting that provided by Costa Rica. But Nicaragua does not deny the existence of a practice of subsistence fishing by Costa Rican riparians. Nicaragua's actions amount to a violation of a locally-applicable customary rule of international law which has caused significant prejudice on the Costa Rican bank of the River.[487]

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[483] See this Reply, paragraphs 3.104-3.108.

[484] See Affidavits of Leonel Morales Chacón, 30 April 2007: CRR, Annexes Vol 2, Annex 50; and of Víctor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

[485] See the following Affidavits in CRM, Annexes, Vol 4: Victor Julio Vargas Hernández (Annex 105); Leonel Morales Chacón (Annex 106); Erick Maikol Martinez López (Annex 107); José Moreno Rojas (Annex 108); and Josefa Alvarez Aragón (Annex 109).

[486] NCM, para. 5.1.1.15.

4.58 Annexed to this Reply is further evidence that Costa Rican riparians are being prevented from subsistence fishing by Nicaraguan authorities.[488] This evidence includes:

(i) An affidavit of 29 July 2007 of Victor Julio Vargas Hernandez, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón confirms that the prohibition on fishing is still in force and that Nicaraguan authorities continue their practice of seizing fishing implements and boats.[489] One of the witnesses states:

> "…the restrictions and prohibition imposed by Nicaragua to Costa Rican riparians of the River to fish for their basic consumption continues to date, under the threat of detention and seizure of their fishing implements and boats."[490]

(ii) A press note of 14 May 2007 affirms Nicaragua's prohibition of subsistence fishing and explains some of its consequences:

> "'We could go fishing before, but not now. If we get caught, they confiscate our boats and we could even be sent to jail in San Carlos de Nicaragua,' added Cerdas.
> He is the oldest inhabitant in Cureña, a community with more than 40 families that survive on the banks of the San Juan.
> Last Friday, Cerdas commented that before they could sell a cow or a pig on the Nicaraguan side, but now it has been prohibited.
> 'Nicaraguan military boats travel up and down the river once or twice a week, precisely to stop fishing or illegal navigation in the river.
> Adrián Lizano, who has been residing in Cureña for the last eight months, grows yams for a living. 'Things are difficult when fishing is not allowed,' he said."[491]

(3) Landing rights

4.59 In its Memorial, Costa Rica demonstrated that it has a right to land at any part of the Nicaraguan bank of the River where navigation is common, a right which implies the right to stop or not to stop. This is inconsistent with an obligation to stop in order to pay charges and to undergo searches.[492]

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[487] See this Reply, paragraphs 3.109-3.121.

[488] See this Reply, paragraphs 3.109-3.121.

[489] Affidavit of Victor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

[490] Affidavit by Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

[491] "Neighbours from the San Juan plea for help", *Al Dia*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

4.60 In its Counter-Memorial, Nicaragua expressly states that it recognises the right of Costa Rican vessels to land at any part of the Nicaraguan bank where navigation is common,[493] but it argues that this right "can only be used for the enjoyment of Costa Rica's right to navigate with articles of trade…"[494] It also argues that "[t]he right to land does not entail freedom to trade anywhere along the route."[495]

4.61 Costa Rica demonstrated in chapter 3 above that the phrase "*con objetos de comercio*" means "for purposes of commerce" and not "with articles of trade".[496] Even if "*con objetos de comercio*" is interpreted as a general limitation on Costa Rica's perpetual right of free navigation, this does not confer a right on Nicaragua to restrict Costa Rica's right to land on the Nicaraguan bank.[497] The evidence presented in this Reply shows that Nicaragua continues to require Costa Ricans to land on the Nicaraguan bank and pay charges.[498]

(4) Facilitation of traffic on the River

4.62 In its Memorial, Costa Rica demonstrated that Article I of the 1956 Agreement provided a duty to facilitate and expedite traffic on the River, a duty which Nicaragua clearly violates by doing everything it can to prevent Costa Rican traffic on the San Juan.[499]

4.63 In its Counter-Memorial, Nicaragua claims that the 1956 Agreement contains no obligations beyond those which result from the 1858 Treaty and the Cleveland Award; since Costa Rica only has a right of navigation "*con*

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[492] CRM, para. 5.138. See also CRM, paras. 4.119-4.120.

[493] NCM, para. 4.1.47.

[494] *Ibid.*

[495] NCM, para. 4.1.48.

[496] See this Reply, paragraphs 3.39-3.78.

[497] See discussion in this Reply, paragraphs 3.122-3.128.

[498] See this Reply, paragraphs 4.05-4.11.

[499] CRM, paras. 5.139-140.

objetos de comercio" – meaning "with articles of trade" – any duty in the 1956 Agreement is limited to navigation "with articles of trade."[500]

4.64 Costa Rica has shown that this interpretation is incorrect. The evidence contained in this Reply demonstrates that Nicaragua continues to impede and prevent Costa Rican navigation on the River.[501]

F. Nicaragua's plea of acquiescence

4.65 In its Counter-Memorial, Nicaragua attempted to show that Costa Rica acquiesced in the restrictions to its navigation on the San Juan. But Nicaragua misrepresents and distorts the facts. It offers only limited examples of private conduct and of recent requests made under constraint. Costa Rica itself has never acquiesced in Nicaraguan restrictions to its rights on the San Juan.

(1) Measures relating to tourism arising from the Memorandum of Understanding of 5 June 1994

4.66 Nicaragua's Counter Memorial argues that the Memorandum of Understanding signed on 5 June 1994 by the Costa Rican and Nicaraguan Ministers of Tourism constitutes a concession from Costa Rica that Nicaragua has the right to adopt measures applicable to tourism on the San Juan River. It states:

> "The Memorandum of Understanding … literally states that Costa Rica must purchase tourists cards from Nicaragua. The language used is clear and leaves no doubt regarding 'the obligation [Costa Rica has] to [purchase tourist cards]' and to register Costa Rican tourist businesses."[502]

4.67 The document Nicaragua refers to is referenced as "CRM Annex 26(3)(b)". Its quotation of that document misrepresents the document, adding words that are neither in the original document in Spanish nor the correct translation in English. The original Spanish text reads:

> "3.- Los Ministros, concientes de la situación existente en la zona, acuerdan buscar e implementar todos los mecanismos a su alcance para facilitar el desarrollo de la actividad turística, por ello convienen en:

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[500] NCM, paras. 6.2.1-6.2.10.

[501] This Reply, paragraphs 4.05-4.24.

[502] NCM, para. 1.3.41.

A.- Realizar un registro detallado de cada compañía turística que opere en la zona, de los navíos utilizados y sus siglas de registro, y comunicarlo al otro país.
B.- Desarrollar, dentro de los proximos treinta días, los mecanismos necesarios para que puedan entregarle tarjetas de turismo a las empresas pre-registradas, quienes tendrán la obligación de comprarlas, llenarlas correctamente y entregarlas a las autoridades correspondientes. Los Ministros procurarán que la misma tarjeta de turismo le sirva al turista para múltiples entradas y salidas durante los treinta días de su validez, así mismo, que el pasaporte no sea el único documento válido de identificación para los turistas."[503]

4.68 As can be seen, the text does not contain any provision which obliges Costa Rica, or Costa Rican tourist operators, to purchase tourist cards from Nicaragua. Nor is there any obligation for Costa Rican tourist operators to register in Nicaragua. To the contrary, in the context of an intention to develop "joint sustainable tourism", and of express language that both Ministers would endeavour to ensure the tourist cards fulfilled certain conditions, the Agreement was that tourist operators would register and buy tourist cards from the authorities of their respective countries – i.e. that Costa Rican tourist operators would register and purchase tourist cards from Costa Rican authorities. Furthermore, both Ministers agreed to inform the other of the registration information. The Agreement contains no obligation for Costa Rican vessels or tourist operators to register with Nicaraguan authorities. It does not, as Nicaragua suggests, constitute a concession from Costa Rica that Nicaragua has the right to adopt measures applicable to Costa Rican tourism on the San Juan.

4.69 The Agreement, although not in force, constitutes a clear indication that Nicaragua recognised that Costa Rica's perpetual right of free navigation included navigation with tourists. It stipulated that each country would keep a registry of tourist operators and would sell tourist cards to those operators. Those tourist cards were intended to be valid for multiple trips in the area of the San Juan.

(2) Navigation of Costa Rican police on the River

4.70 Nicaragua contends that it permitted navigation of Costa Rican police personnel carrying their normal arms as a matter of "border courtesy".[504] However

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[503] CRM, Annexes, Vol 2, Annex 26.

[504] NCM, para 1.3.43.

Nicaragua does not produce to the Court a single piece of evidence, documentary or otherwise, supporting this allegation. This Reply contains evidence that Costa Rican police continuously navigated on the River,[505] navigation which did not and does not require permission from Nicaragua because it falls within the scope of Costa Rica's perpetual right of free navigation under the 1858 Treaty and the 1888 Cleveland Award, specifically under the Second article of that Award.[506]

4.71 The *modus operandi* carried out by Costa Rican police navigating on the San Juan in the second half of the 1990's entailed only an understanding that Costa Rican police officers would communicate their passage to the Nicaraguan authorities, with the *animus* of cooperation with Nicaragua. Neither the 1995[507] or the 1998[508] Agreements established a "concession" from Costa Rica, nor is there any official document in which Nicaragua "granted" "permits" to Costa Rica, nor any document from Costa Rica requesting them, simply because that never occurred. At the time of the *modus operandi*, both countries unequivocally recognised that Costa Rica had a perpetual right of free navigation which included navigation of this kind.

4.72 Nicaragua misconstrues the Alajuela Declaration of 26 September 2002, which it cites to suggest that Costa Rica had no interest to raise the issue of navigation to re-supply border posts.[509] In that Declaration, both parties agreed to "freeze" the legal situation claimed by each of them for three years. Article 4 of the Declaration expressly stipulated that it could not be interpreted or prejudged as a renunciation or in detriment of the positions and rights that each party had within the framework of international law.[510]

4.73 In connection to the Declaration, in a Note addressed to the Nicaraguan Foreign Minister dated 26 September 2002, the Costa Rican Foreign Minister indicated the willingness of Costa Rica not to exercise any police navigation during the three years of the Alajuela Declaration. Nicaragua misconstrues this note, arguing that it confirmed Costa Rican authorities were not convinced that they had a need for or a right of navigation by police for the purposes of re-supplying border posts.[511] The Note did not express anything of this character. It addressed Costa Rica's willingness not to navigate with its police forces for the purpose of re-supplying border posts in a context where Nicaragua had threatened not to permit such navigation (including threats of the use of weapons), and in a context where the Alajuela Declaration signed by both parties expressly reserved each of their claims for a period of three years.

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[505] See this Reply, Appendix, paragraphs A.33-A.44.

[506] See this Reply, paragraphs 3.79-3.95 above.

[507] Joint Communiqué (Cuadra-Castro), La Cruz, 8 September 1995: CRM, Annexes, Vol. 2, Annex 27.

[508] Joint Communiquè (Cuadra-Lizano), Managua, 30 July 1998: CRM, Annexes, Vol. 2, Annex 28.

[509] NCM, para. 5.2.10.

[510] CRM, Annexes, Vol 2, Annex 29.

(3) Allegations that Costa Rica recognises the need to obtain permission to navigate on the San Juan

4.74 Nicaragua claims that Costa Rica has repeatedly recognised the needs to obtain permission from Nicaragua to navigating on the San Juan.[512]

4.75 To support its allegation Nicaragua presented two notes from almost a year after Costa Rica commenced these proceedings: a Note of 19 June 2006 from Dr. Thais Ching Zamora, Director of the Puerto Viejo de Sarapiquí Health Area,[513] and a Note from a private organization called "Comunidad Alianza Cristiana y Misionera" from the town of Horquetas de Sarapiquí.[514]

4.76 In respect of the first note, the circumstances in which Dr. Ching was effectively forced to submit her note to the Nicaraguan Ambassador have already been explained.[515] Dr. Ching's request came under conditions of duress as a result of the Nicaraguan prohibition of navigation by Costa Rican health officials.[516] That prohibition may have resulted in a significant increase in health risks for riparians in the area, with children being particularly vulnerable. Bearing in mind that access to these communities is extremely difficult if one cannot navigate on the River, and also taking into consideration the rapid spread of dengue and other diseases in Central America,[517] it is understandable that the possibility of a major sanitary crisis[518] would compel Costa Rican authorities to do everything in their power to gain access to these communities, as they did.

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[511] NCM, para. 5.2.10.

[512] NCM, para. 6.2.11.

[513] NCM, Vol II, Annex 51.

[514] NCM, Vol II, Annex 52.

[515] See this Reply, paragraphs 4.24-4.30 above.

[516] See CRM, Annexes, Vol 4, Annex 99.

4.77 Other examples of recent requests made by Costa Rican authorities follow the same pattern.[519] Nicaragua prohibits the long standing navigation of Costa Rican officials, and forces those institutions to request "permissions" to provide essential social and medical assistance. Thus Nicaragua has effectively forced these institutions to comply with its requirements for permission to navigate. In the circumstances it is clear that these requests do not amount to a concession by Costa Rica but are a product of the emergency situation Nicaragua has created.

4.78 Nicaragua attempts to present these recent requests as State practice. Two points must be emphasised in response to this attempt. First, any requests that may have been made by local institutions result from the prohibition to navigate imposed by Nicaragua, as Dr. Ching's experience shows. Second, Nicaragua's demands for written requests using prescribed language came well after the filing of the application by Costa Rica in September 2005, and even after the filing of Costa Rica's Memorial.[520]

4.79 With respect to the second note, from "Comunidad Alianza Cristiana y Misionera de Horquetas", an independent and private religious organization, similar considerations are applicable. This incident has also been described in this Reply,[521] and in any case is a request made by a citizen that does not in any way constitute State practice by Costa Rica, as neither would any other request from a private party.

4.30 It should be remembered that, as stated by Rodrigo Zamora, the preacher in charge of *Comunidad Alianza Cristiana y Misionera de Horquetas*, the organization needed to transport health, sanitary and food articles to Costa Rican communities along the San Juan River. Although Nicaragua has recognised that this navigation (according to Nicaragua only with "articles of trade") should be free,[522] the Nicaraguan authorities demanded that the organization seek a permit to navigate.[523] Evidently the request by the missionaries was made in the context of the duress created by Nicaragua, in which there was no other means for them to reach the communities they intended to visit along the San Juan River.

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[517] See "Health Authorities Watch the Northern Border for Leptospirosis", *La Nación*, San José, 30 October, 2007: CRR, Annexes, Vol 2, Annex 62.

[518] See above, footnote 457.

[519] See this Reply, paragraphs 4.26-4.41.

[520] See above, paragraphs 4.26-4.41; Affidavit of Thaïs Ching Zamora, 8 August 2007: CRR, Annexes, Vol 2, Annex 55.

[521] See above, paragraphs 4.42-4.43.

4.81 Even more troubling is the statement made by a staff member of the Nicaraguan Embassy in San José informing Mr. Zamora that if the missionaries were Costa Ricans there would be trouble in granting them the permission. In Mr. Zamora's own words:

> "…when he arrived at the Nicaraguan Embassy in San Jose, he was attended by a member of staff who told him that if the missionaries travelling on the San Juan River were Costa Ricans there would be problems, to which he replied that they were mostly foreign missionaries."[524]

4.82 It seems that the intention behind forcing Costa Ricans to present written requests to navigate the San Juan, in precise terms dictated by the Nicaraguan Embassy, was to produce evidence upon which Nicaragua could argue that there was State practice from Costa Rica requesting permission to navigate. In other words, Nicaragua is attempting to profit from its own violations.

G. Conclusions

4.83 This Chapter has demonstrated that Nicaragua has violated Costa Rica's navigational and related rights in the San Juan, and that those violations are continuing. Further restrictions were imposed on Costa Rican navigation after Costa Rica filed the Application in the present case. Restrictions include the obligation to land at the Nicaraguan bank and payment for a "departure clearance certificate", the imposition of other charges including tourist and immigration fees and searches to Costa Rican vessels and their passengers. After the filing of Costa Rica's Application, Nicaraguan authorities required Costa Ricans navigating on the San Juan to purchase a Nicaraguan visa in advance and Costa Rican riparians were prevented from their long-standing practice of fishing in the River. In addition to the prohibition on navigation by Costa Rican police, all forms of navigation by Costa Rican Government officials have been subject to restrictions – which has serious implications for the provision of health and social assistance and education to inhabitants of the Costa Rican bank, many of who are Nicaraguan. Further, timetables restricting Costa Rican navigation have been maintained and new restrictions have been imposed, including limitations to the places on Costa Rican territory which can be visited when navigating on the San Juan and limitations to the duration of those visits. Costa Rican vessels are also required to fly a Nicaraguan flag when navigating on the River.

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[522] See NCM, para 4.1.10.

[523] See Affidavit of Rodrigo Antonio Zamora Arroya, 28 July 2007: CRR, Annexes, Vol 2, Annex 53.

[524] See Affidavit of Rodrigo Antonio Zamora Arroya, 28 July 2007: CRR, Annexes, Vol 2, Annex 53.

4.84 It has also been demonstrated that Costa Ricans who need to use the San Juan River are actively discouraged from doing so, both by the increased restrictions imposed by Nicaragua and by the harassment they are subjected to by the Army and Immigration authorities who control the River. As part of the strategy to discourage Costa Rican navigation on the San Juan, Nicaragua has even increased its military presence on the River in order to discourage all Costa Rican navigation. Nicaragua issued a Presidential Decree allowing their military personnel to detain Costa Rican police navigating on the River, and in fact to use force against them.[525] Statements of Costa Rican riparians confirm that the increased military presence on the River has indeed served to impede them from fishing and, in general, caused them to feel threatened and to fear for their personal security if they navigate. The following testimony provides evidence of this fact:

"Rafael Palacios has lived for 10 years in Medio Queso, in Los Chiles de Upala. He takes people down the river in his boat. 'If anyone asks me to go up to the San Juan I say no, I will not take any chances,' said Palacios. He claims that when Daniel Ortega came to power, surveillance in the San Juan River has been strengthened. 'Now there are more soldiers with fast boats. If they see you in the river, they will catch you faster,' said Palacios.

Along that small affluent of Medio Queso, he goes up 500 meters from the Nicaraguan post. He does not go any further.

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[525] Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, Nicaraguan Official Gazette No. 188 of 29 September 2005: CRR, Annexes, Vol 2, Annex 69.

'One cannot take any chances. They can confiscate your boat and even take you to jail to San Carlos de Nicaragua. You must even pay a fine for trespassing the border,' said Palacios."[526]

4.85 More recently, a Nicaraguan congressman proposed to create a military school on the Nicaraguan border of the San Juan River. His statements were recorded by the Nicaraguan press in the following terms:

> "Congressman Enrique Quiñónez, of the Constitutional Liberal Party, PLC, wants a military training school of the Nicaraguan army to operate along the San Juan River as an irrefutable sign that the river belongs to Nicaragua and to stop Costa Ricans from using that waterway for tourist activities.
>
> The statements made by the Liberal legislator came when President Daniel Ortega announced his intentions to withdraw the case on the dispute for the river from The Hague and reach an extrajudicial agreement with Costa Rica.
>
> ...Concerning this matter, Quiñónez said 'many times Costa Ricans abuse their navigation rights and navigate the river armed and profit from tourism, something not even Nicaraguans have done.'
>
> The PLC Congressman, President of the Committee of the Interior of the National Congress, said this is a very simple situation. 'I have always stated we should detach two strong police and army posts and even open a military training school and then just wait and see if any tourists will visit that zone with our soldiers practicing in their own territory.
>
> ...'I have always said we want to see our army there, as a sign of sovereignty and by no means is it an aggression because it is our territory and we can have training commandos. Maybe Costa Rican and other foreign tourists will enjoy seeing how our soldiers train in the river,' said Quiñónez."[527]

4.86 Nicaragua's strategy of "militarization" of the River area clearly contravenes Article IX of the 1858 Treaty of Limits, which states that:

> "Under no circumstances, and even in case that the Republics of Costa Rica and Nicaragua should unhappily find themselves in a state of war, neither of them shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or the San Juan river, or in the Lake of Nicaragua."[528]

4.87 Nicaragua has argued that Costa Rica acquiesced in the restrictions to its navigation on the San Juan. These arguments are based on misleading or misrepresented facts, as the treatment by Nicaragua of the text signed by the

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[526] "Neighbours from the San Juan plea for help", *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

[527] "The San Juan River should be militarized", *El Nuevo Diario*, Managua, 7 October 2007: CRR, Annexes, Vol 2, Annex 61.

[528] CRM, Annexes, Vol 2, Annex 7(b).

Ministers of Tourism in 1995 demonstrates. Furthermore Nicaragua engaged in a policy whereby Costa Rican people and institutions were obliged to request written permission to navigate on the River from the Nicaraguan Embassy in Costa Rica. This policy was put into effect after Costa Rica presented its Application to the Court in September 2005 and seems intended to provide documentary support for allegations of State practice by Costa Rica requesting permission to navigate on the San Juan. As has been demonstrated in this Chapter, no such practice exists, and in fact the few instances where Costa Rican Government officials requested permission were due precisely to the situation created by Nicaragua's restrictions on Costa Rican navigation, and in some instances there is clear evidence of manipulation of Costa Rican officials by Nicaraguan Consular and Diplomatic representatives. Costa Rica rejected any and all allegations by Nicaragua that it has acquiesced in Nicaragua's restrictions of its perpetual right of free navigation on the River and its related rights.

Chapter 5

Remedies

A. Costa Rica's Entitlements

5.01 In its Memorial Costa Rica requests the following remedies as a consequence of the internationally wrongful acts committed by Nicaragua:

(1) a declaration of the extent of Nicaragua's violations of its obligations;
(2) the cessation of the internationally wrongful acts that continue to be committed by Nicaragua;
(3) reparation by Nicaragua for damage caused as a result of those violations; and
(4) appropriate guarantees of non-repetition by Nicaragua of its wrongful conduct.[529]

5.02 Nicaragua does not dispute that the Court may grant declaratory relief: in fact it requests a declaratory judgment in its favour.[530]

5.03 Nicaragua does not address Costa Rica's claim to cessation of internationally wrongful acts but merely asserts that Nicaragua has not committed any such acts.

(1) Nicaragua's claim that Costa Rica seeks to exercise diplomatic protection

5.04 Nicaragua claims that Costa Rica is not entitled to certain of the remedies it has claimed because they "could only be made as a matter of diplomatic protection, the conditions for which are not fulfilled in the present case." It refers generally to Costa Rica's claim for compensation for the losses and expenses incurred by Costa Rican citizens and Nicaragua's obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.[531] Apart from these general statements it does not specify further which of the remedies or claims are, in its view, diplomatic protection claims. Nor does it state which conditions it alleges are not fulfilled for such a claim to be brought. However, given that the losses all involve Costa Rican citizens and Costa Rican vessels, it appears that Nicaragua is alluding to a requirement to exhaust local remedies.

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[529] See CRM, para. 6.01.

[530] NCM, para. 7.1.1 and paras. 7.2.1-7.2.6.

[531] NCM, para. 7.1.10.

5.05 Nicaragua's objection to Costa Rica's request for remedies must be considered in the context of Costa Rica's primary claim, which is a claim concerning Costa Rica's own navigational rights under the 1858 Treaty of Limits. Article VI of the Treaty of Limits provides for a perpetual right of free navigation for the Republic of Costa Rica as a State party to that Treaty.[532] That right includes the unrestricted and permanent right of movement for Costa Rican vessels whether engaged in the transport of goods or passengers or both, on the routes and to the places established by the 1858 Treaty of Limits.[533] Costa Rica's rights of navigation are not claimed as a matter of diplomatic protection but as treaty rights belonging to Costa Rica.

5.06 An element of the compensation claimed by Costa Rica by way of reparation includes losses caused to Costa Rica for charges, visas and permits required by Nicaragua for Costa Rican vessels and Costa Rican citizens. These losses have occurred as a direct result of the internationally wrongful acts of Nicaragua in violation of Costa Rica's treaty rights of navigation. This claim for reparation does not transform Costa Rica's claim for its treaty rights into a diplomatic protection claim. It is merely an element of the loss suffered by Costa Rica as a result of Nicaragua's internationally wrongful conduct.

5.07 In any event, even if Costa Rica's claim for compensation for losses caused to Costa Rica for charges, visas and permits required by Nicaragua for Costa Rican vessels and Costa Rican citizens could be characterised as a diplomatic protection claim, that claim is incidental to Costa Rica's claim for its own treaty rights. The dominant claim is Costa Rica's claim for its own navigational rights pursuant to the Treaty of Limits.

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[532] See, generally, CRM, paras. 4.06-4.16.

[533] See CRM, para. 4.1.6.

5.08 Any diplomatic protection claim brought to vindicate the rights of Costa Rican vessels and citizens in respect of the San Juan River could be brought alongside Costa Rica's treaty claim without a need to exhaust local remedies because Article VI of the Treaty of Limits creates interdependent rights for both Costa Rica and Costa Rican nationals. The situation is analogous to the claim before the Court in the *Case Concerning Avena and other Mexican Nationals*, where Mexico asked the Court:

> "…to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has 'violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals.'"[534]

The Court there noted that Mexico did not claim to be acting solely on the basis of diplomatic protection, but that it "also asserts its own claims, basing them on the injury which it contends that *it has itself suffered, directly and through its nationals*" as a result of the treaty violations of the United States.[535] It recalled its finding in the *LaGrand* case that the Article 36(1) of the Vienna Convention created individual rights for the national concerned, and held that in circumstances where a treaty conferred both rights on the state and individual rights, Mexico could claim for violations of both sets of rights without a need to exhaust local remedies:

> "It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection. Without needing to pronounce at this juncture on the issues raised by the procedural default rule … the Court accordingly finds that the second objection by the United States to admissibility cannot be upheld."[536]

5.09 A similar claim was made by Nicaragua in its applications against the United States and Costa Rica, the latter subsequently abandoned before any finding on jurisdiction or merits. In both applications, Nicaragua claimed compensation "both on its own behalf and in respect of wrongs inflicted upon its nationals."[537] In those cases, no local remedies had been employed, still less exhausted.

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[534] See *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, 35 (para. 40).

[535] Ibid. (emphasis in original).

[536] Ibid., 36 (para. 40).

(2) Assurances and guarantees of non-repetition

5.10 Nicaragua also contests Costa Rica's request for assurances and guarantees of non-repetition. It contends that assurances and guarantees of non-repetition are not required in all circumstances and that they are not required in the present case. It has suggested that "Nicaragua has constantly and consistently reaffirmed her commitment to strictly respect the 1858 Treaty of Limits" and assurances and guarantees of non-repetition "would add nothing to these firm commitments".[538]

5.11 Further, Nicaragua argues that there is "no legal basis" for the Court to comply with Costa Rica's request that the assurances and guarantees of non-repetition include the "abrogation of those legislative and administrative measures taken by Nicaragua that, if continued in force, would constitute a violation" of Nicaragua's obligations in respect of Costa Rica's navigational and related rights.[539] It adds that Costa Rica's submission is "vague and based on insufficient evidence".[540]

5.12 Costa Rica has requested assurances and guarantees of non-repetition because Nicaragua's violations of its navigational and related rights are consistent and continuing.[541] This is further evidenced by Nicaragua's continuing denial of the very existence of Costa Rica's rights.[542] This is precisely the situation in which assurances and guarantees of non-repetition are required, to ensure the restoration of confidence in a continuing relationship in circumstances where the injured state "has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily".[543]

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[537] *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, p. 20, para. 17. See also *Application instituting Proceedings submitted by the Government of Nicaragua against Costa Rica, Nicaraguan Memorial*, p. 112, para. 3.

[538] NCM, paras. 7.1.11-13.

[539] CRM, para. 6.23.

[540] NCM, para. 7.1.9.

[541] See for example, this Reply, paragraphs 4.05-4.49.

[542] See for example, this Reply, paragraphs 4.05-4.49.

5.13 Demands for assurances and guarantees of non-repetition were found to have been satisfied by the respondent State in *LaGrand*, *Avena* and *Case concerning Armed Activities on the Territory of the Congo*. In each case the respondent State had made an express additional commitment addressing the specific requests made by the applicant. It was not sufficient that the respondent State's obligations were incorporated in an existing treaty provision which was the subject of the dispute: some new and specific commitment was required. In *LaGrand* the United States presented an apology to Germany for the specific breach of the Vienna Convention and carried out a "vast and detailed programme in order to ensure compliance by its competent authorities… with its obligations under Article 36 of the Vienna Convention."[544] In *Avena* the Court noted that the United States had made "considerable efforts" to ensure that its law enforcement authorities provided consular information to persons in accordance with its obligations under the Vienna Convention: in the circumstances this was regarded as meeting Mexico's request for a general assurance of non-repeitition.[545] In *DRC v Uganda* Uganda entered into a new, binding international agreement which contained a specific obligation in the same terms as the DRC's request for assurances and guarantees. The Court found that this amounted to "a clear legally binding undertaking that [the respondent] will not repeat any wrongful acts" and therefore met the DRC's request for specific guarantees and assurances of non-repetition.[546] Although the Court in its recent decision in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* declined to grant Bosnia and Herzegovina's request for assurances and guarantees of non-repetition in respect of breaches of the obligation to prevent and punish genocide, it did so in circumstances where it had already made a direction concerning the Respondent's continued duty of punishment and obligation to cooperate with the International Criminal Tribunal for the former Yugoslavia: again it considered that direction was sufficient to meet the Claimant's request.[547]

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[543] CRM, para. 6.22. See CRM, paras. 6.19-6.23, citing *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 466, 512 (para. 123).

[544] *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 466, 512 (para. 123).

[545] *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), Judgment*, I.C.J. Reports 2004, p. 12, pp. 68-98, paras. 149-150.

[546] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, para. 257.

5.14 In contrast, Nicaragua has offered no apology for its consistent and continued violations of Costa Rica's rights of navigation. It has expressed its commitment to respect the Treaty of Limits but it has taken an impossibly narrow interpretation of those rights, and it has made no attempt to deny facts which, even on its own view of the matter, unquestionably constitute violations of Costa Rica's rights. In these circumstances Nicaragua's assertion that it is committed to respecting the 1858 Treaty of Limits is devoid of practical meaning. In addition, Nicaragua has offered no commitment in respect of Costa Rica's related rights, including the right of riparians to subsistence fishing. Costa Rica affirms its request for assurances and guarantees of non-repetition which are necessary to ensure that Costa Rica's rights are protected.

5.15 Nicaragua's rejection of Costa Rica's request for the abrogation of legislative and administrative measures taken by Nicaragua which, if continued in force, constitute a violation of Nicaragua's obligations[548] is similarly devoid of merit. Assurances and guarantees of non-repetition, including repeal of legislation which allowed the breaches to occur, may be sought by way of satisfaction.[549] Such assurances are a necessary element in the protection of Costa Rica's rights. Costa Rica has referred to two Nicaraguan Presidential Decrees which deal with the imposition of the requirement that Costa Ricans pay for a visa to navigate on the San Juan and the prohibition of police navigation respectively,[550] and the protection of Costa Rica's rights requires that these Decrees and all other relevant measures be abrogated.

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[547] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro), Merits, Judgment*, 26 February 2007, at pp. 166-167, paras. 465-466.

[548] CRM, para. 6.23; NCM, para. 7.1.9.

[549] See ILC Commentary to the Articles on State Responsibility, Article 30(b), para. (11); Article 37, para. (5).

[550] See this Reply, paragraphs 4.52 and 4.84.

(3) Compensation

5.16 Costa Rica has claimed reparation under established principles of international law,[551] including restitution and compensation.[552] It has specified the pecuniary compensation it claims to include:

"(a) the loss caused to Costa Rican vessels arising from the so-called 'departure clearance certificate' imposed on Costa Rican vessels navigating the San Juan River;

(b) the loss caused to Costa Rica for the charge of tourism cards, transit permits and immigration fees imposed on Costa Rican vessels navigating the San Juan River;

(c) the loss caused to Costa Rica for the charge of a consular visa to any Costa Rican citizen seeking to navigate the San Juan River;

(d) the losses caused to Costa Rica for the further expenses incurred by Costa Rican citizens, the consequential losses in their activities, as well as all other material and moral damage suffered by them;

(e) the expenses and costs incurred by Costa Rica as a result of Nicaragua's violations causing Costa Rica to be unable to resupply the police posts along the Costa Rican bank through the San Juan River;

(f) interest at prevailing rates from the time the claim arose until the payment of the judgment; and

(g) such other relief as the Court may deem appropriate."[553]

5.17 Nicaragua alleges that Costa Rica has failed to establish a causal link between Nicaragua's internationally wrongful acts and the injuries for which Costa Rica is claiming compensation.[554] In fact Costa Rica's Memorial contains detailed specification first of Costa Rica's rights, then of Nicaragua's violations of those rights.[555] These matters are summarised in Costa Rica's request for a declaration.[556] Where Costa Rica has requested compensation – to be assessed in a separate phase of these proceedings – it has specified the particular category of loss, whether in the form of charges, expenses and costs directly resulting from Nicaragua's internationally wrongful acts.[557]

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[551] See CRM, paras. 6.08-6.10.

[552] See CRM, paras. 6.11-6.17.

[553] CRM, para. 6.15

[554] See NCM, para. 7.1.7.

[555] See CRM Chapters 4 and 5 respectively.

[556] CRM, para. 6.03 and Submissions, pp. 147-148.

[557] CRM, para. 6.15.

5.18 In accordance with the Court's previous practice, Costa Rica has requested the Court to reserve the determination of the scope of compensation due from Nicaragua to a subsequent phase of the case. Citing the Court's decision in the *United States Diplomatic and Consular Staff in Tehran Case*, Costa Rica notes that this "is particularly required in the present proceedings because Nicaragua's breaches are still continuing."[558] Consistently with the Court's decision in the *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)*, Costa Rica requests that the Court declare that Costa Rica is entitled to compensation for all injuries caused by Nicaragua's unlawful acts, reserving its right to submit a concrete claim as to the amount, as well as evidence of damages caused, at a later stage.[559]

5.19 In the *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)*, Germany requested compensation for alleged acts of harassment of its fishing vessels by Icelandic coast patrol boats. It did not, however, ask for an assessment of compensation for certain specified acts but "for a declaration of principle that Iceland is under an obligation to make compensation to [Germany] in respect of all unlawful acts of interferences with the fishing vessels of [Germany]."[560] The Court noted that Germany listed a large number of incidents involving its vessels and a general account of what Germany described as harassment of its fishing vessels by Iceland.[561] But the Court refused to accede to Germany's request, noting that Germany had not requested that compensation be assessed in a subsequent phase of the proceedings:

> "It is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed. Moreover, while the Applicant has reserved all its rights 'to claim compensation', it has not requested that these damages be proved and assessed in a subsequent phase of the present proceedings. It would not be appropriate for the Court, when acting under Article 53 of the Statute, and after the Applicant has stated that it is not submitting a claim for the payment of a certain amount of money as compensation, to take the initiative of requesting specific information and evidence concerning the

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[558] CRM, para. 6.16.

[559] CRM, para. 6.17.

[560] *Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Merits*, ICJ Reports 1974 p. 175, p. 204, (para. 74).

[561] Ibid. (paras. 74-75).

indemnity which, in the view of the Applicant, would correspond to each incident and each head of damage."[562]

5.20 In *Military and Paramilitary Activities in and against Nicaragua (Merits)*, Nicaragua requested the Court to declare that compensation was due to Nicaragua and "to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua."[563] The Court considered Nicaragua's request for the "nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings" to be appropriate.[564] Similar findings have been made in other cases, including *Factory at Chorzów (Merits)*,[565] *Corfu Channel (Merits)*,[566] *United States Diplomatic and Consular Staff in Tehran*[567] and *Armed Activities on the Territory of the Congo*.[568]

5.21 Nicaragua objects to Costa Rica's request for compensation on the basis of the "vague and indistinct character of the alleged damages and of the requested reparation."[569] Nicaragua concedes that a claimant may request a general declaration establishing that compensation is due, provided it asks the Court to determine the amount of damage in a subsequent proceeding, as stated in the *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)*. But it argues that the Court "is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence".[570]

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[562] Ibid., 204-205 (para. 76).

[563] *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986 p. 14, p. 142 (para. 283).

[564] Ibid. (para. 284).

[565] *Factory at Chorzów, Merits*, PCIJ Reports, Series A, No. 17 (1928) p. 64, paras. 7-8 of the Dispositif.

[566] *Corfu Channel, Merits*, ICJ Reports 1949, p. 26. In its final submissions the UK requested the Court to determine that, as a result of the breach by the Albanian Government of its obligations under international law, it had sustained damages amounting to £875,000 (ibid., 23). The Court held that it had jurisdiction under the Special Agreement to assess the amount of the compensation, but reserved the question to a subsequent phase (ibid., 26).

[567] *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Reports 1980, pp.41-2 (para. 90); p 45, Dispositif, paras. (5)-(6).

[568] *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, dispositif para (14). See also ibid., paras. 259-260.

[569] NCM, para. 7.1.5.

[570] NCM, para. 7.1.7, citing I.C.J. 1974, p. 204 (para. 76).

5.22 Nicaragua's use of the Court's decision in *Fisheries Jurisdiction* on this point is inapposite for two reasons.

(i) First, as the Court noted in *Fisheries Jurisdiction*, Germany did not request that the damages be proved and assessed in a subsequent proceeding; it only reserved its rights "to claim compensation."[571] This stands in clear contrast to the present case.[572] After listing the specific violations of Costa Rica's rights in its submissions, Costa Rica asks the Court to adjudge and declare that Nicaragua is obliged, *inter alia*,

> "to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua's obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings."[573]

In the circumstances, the Court's statement that "[i]t is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed" is directly applicable to Costa Rica's request.[574]

(ii) Second, Costa Rica has not requested the Court to make "an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence." Costa Rica has specified Nicaragua's breaches of Costa Rica's perpetual right of free navigation and related rights.[575] It has specified each and every right that Nicaragua has violated and has requested the Court to adjudge and declare that Nicaragua has violated those rights.[576] In addition, it has specified the elements which should be included in compensation, and that each element has been caused by Nicaragua's internationally wrongful acts.[577] Costa Rica's request is at least as specific as the submissions in cases where the Court has granted requests for a declaration that compensation

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[571] Ibid.

[572] CRM, para. 6.17.

[573] CRM, Submissions, para. 3(b), p. 148.

[574] *Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Merits*, ICJ Reports 1964, p. 204 (para. 76).

[575] CRM, para. 5.144.

[576] CRM, para. 6.03. See also CRM, Submissions, para. 2, p. 147.

[577] CRM, para. 6.15.

is due, reserving determination of the scope of compensation due to a subsequent phase of the case.

5.23 It is true that in both *Fisheries Jurisdiction* and *Military and Paramilitary Activities in and against Nicaragua* the Court was faced with a situation where the respondent State had failed to appear.[578] However, neither case supports an argument that a declaration that compensation is payable, the amount of compensation to be determined in a subsequent phase of the proceedings, cannot be made by the Court when both parties participate in the merits phase. In fact the Court has granted such a declaration in cases where both parties participated in the merits phase. This was the case in *Factory at Chorzów (Merits),*[579] *Corfu Channel (Merits),*[580] and most recently in *Armed Activities on the Territory of the Congo.*[581] Further in *United States Diplomatic and Consular Staff in Tehran*, Iran failed to appear but the Court did not refer to the fact that the respondent State failed to appear nor to Article 53 in providing that the amount of reparation was to be determined at a subsequent phase.[582] In *United States Diplomatic and Consular Staff in Tehran* the Court noted that where violations were continuing, as in the present case, "the form and amount of … reparation" could not be determined at the present time.[583] Given that violations are continuing in the present case, it is clear that an order in the terms sought by Costa Rica is appropriate.

B. Nicaragua's request for a declaration

5.24 Nicaragua has requested the Court to issue a declaration about the extent of Costa Rica's rights of navigation. The first five paragraphs of the declaration relate to the scope of Costa Rica's rights of navigation and, consistently with

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[578] As noted by NCM, para. 7.1.8.

[579] *Factory at Chorzów, Merits*, P.C.I.J. Reports, Series A, No. 17 (1928) p. 64, paras. 7-8 of the Dispositif.

[580] *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 26.

[581] *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, dispositif para (14).

[582] *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, pp. 41-42 (para. 90). See also ibid., 7-8. (para. 8, reproducing the US submissions).

[583] *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, pp. 41-42 (para. 90).

Nicaragua's attempts to limit Costa Rica's rights, request the Court to declare Costa Rica's rights are of a limited character.[584]

5.25 In light of Costa Rica's arguments as to the scope of its rights, Nicaragua's request for a declaration in the terms it proposes must be rejected. The terms of the declaration sought by Costa Rica accurately reflect Costa Rica's perpetual rights of free navigation resulting from international law, particularly the 1858 Treaty of Limits, the Cleveland Award of 1888, the judgment of the Central American Court of Justice of 13 September 1916 and the 1956 Agreement pursuant to Article IV of the Pact of Amity.

5.26 The remaining five paragraphs of Nicaragua's declaration relate to separate allegations, some of which bear no relation to the dispute before the Court.[585]

5.27 Nicaragua requests the Court to declare that Costa Rica "is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security."[586] But the requirements actually imposed by Nicaragua (without any evident legislative basis) are a breach of Costa Rica's rights under the applicable instruments and decisions: a declaration in the terms sought by Nicaragua cannot accordingly be granted.

5.28 Nicaragua asserts that "Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks."[587] The fact is that no such services are provided, and even if they were, compulsory payment for services on a river subject to the regime of the Treaty of Limits would contradict the perpetual right of free navigation.

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[584] See NCM, para. 5.2.5.

[585] See Rules, Article 80(2). Quite apart from the requirement of timeliness, Article 80 requires a counter-claim to be "directly connected with the subject-matter of the claim of the other party": see Article 80(1). Nicaragua's "reservations", even if they had been timely presented as counter-claims, would not have satisfied this requirement. See discussion in this Reply, paras. 1.16-1.17.

[586] NCM, para. 7.2.6.

[587] *Ibid.*

5.29 Nicaragua alleges that "Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858."[588] Exactly what is meant by this statement is unclear, especially in the circumstances that there have been no "modern improvements in the navigation of the river", indeed no improvements of any kind. In any event (even if, hypothetically, there had been any such improvements), Costa Rica's perpetual and free right of navigation cannot be made subject to charges by Nicaragua. This was confirmed by President Cleveland, who decided:

> "4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the bay of San Juan de Norte from being obstructed; to keep the navigation of the river or port free and unembarrassed, or to improve it for the common benefit.
>
> 5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned."[589]

5.30 Nicaragua claims that "[r]evenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty."[590] This is related to Nicaragua's attempt to limit Costa Rica's free right of navigation, and its rights of navigation with revenue service vessels expressly recognised in the Cleveland Award. Costa Rica has shown that Nicaragua's claim to limit Costa Rican navigation in this way is without foundation.[591]

5.31 Finally, Nicaragua makes an assertion about its rights to dredge the San Juan, a matter which is not related to any aspect of the dispute now before the Court. It claims:

> "v. Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River."[592]

This claim, like Nicaragua's purported reservations,[593] is without merit and without incidence for the present case. On the contrary, any work of improvement by Nicaragua cannot result in damage to Costa Rican territory, as provided for by President Cleveland:

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[588] *Ibid.*

[589] CRM, Annexes, Vol 2, Annex 16. See further discussion this Reply, paragraphs 3.08-3.35.

[590] NCM, para. 7.2.6.

[591] See this Reply, paragraphs 3.79-3.95.

[592] NCM, para. 7.2.6.

[593] See discussion in this Reply, paragraphs 1.16-1.17.

"6. The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the river San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement."[594]

5.32 In recent correspondence, Costa Rican Foreign Minister Roberto Tovar Faja expressed support in principle for improvement works on the San Juan, while noting that "those improvements works must be carried out without causing any damage to Costa Rican territory, as provided for in the 1888 Award of the President of the United States."[595] Although the Nicaraguan Foreign Minister replied on 8 May 2006, his note made no reference to the issue of damage to Costa Rican territory.[596]

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[594] CRM, Annexes, Vol 2, Annex 16.

[595] See Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-187-06, 5 May 2006: CRR, Annexes, Vol 2, Annex 42. See also Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-37-06, 26 January 2006 (CRR, Annexes, Vol 2, Annex 39), in which Costa Rica requested information about Nicaragua's planned works to dredge the San Juan, as had been reported by the press. In its response, Nicaragua confirmed that "infrastructure and improvements works for social benefit" were being carried out in the San Juan: Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No. MRE/DM-JI/262/02/06, 17 February 2006: CRR, Annexes, Vol 2, Annex 40. Despite this assertion, to date no improvements works have begun in the area, nor has any dredging occurred. See also Nicaraguan Foreign Minister,Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No. MRE/DM-AJ/340/03/06, 16 March 2006: CRR, Annexes, Vol 2, Annex 41.

[596] See Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No MRE/DM-JI/511/05/06, 8 May 2006: CRR, Annexes, Vol 2, Annex 43.

SUMMARY

1 These proceedings concern breaches by Nicaragua of Costa Rica's perpetual right of free navigation and related rights in respect of the San Juan River. These rights are set out in a series of treaties and decisions including the Treaty of Limits of 15 April 1858 and the Cleveland Award of 1888, and also result from customary international law. Since the 1990s Nicaragua has imposed and maintained restrictions on the navigation of Costa Rican vessels and their passengers on the San Juan which are contrary to Costa Rica's rights. Since these proceedings were commenced, Nicaragua has tightened existing restrictions and imposed new restrictions which in combination tend to deny the substance of Costa Rica's rights entirely.

2 The San Juan is a boundary river governed by an international treaty regime attributing to Costa Rica a perpetual right of free navigation for purposes of commerce. Nicaragua's sovereignty over the waters of the San Juan cannot be used to restrict or limit the scope and exercise of the perpetual right of free navigation, which was recognised by the Treaty of Limits at the same time as sovereignty over the River was granted to Nicaragua.

3 As to the substance of the rights relied on by Costa Rica:

(1) A good faith interpretation of the ordinary meaning of the terms in their context –both internal and external – taking into account the object and purpose of the Treaty of Limits leads to the inexorable conclusion that the phrase "*con objetos de comercio*" means "for purposes of commerce" and not "with articles of trade".

(2) Subsequent agreements, subsequent practice, and rules of international law applicable to the dispute, and the behaviour of Nicaragua itself, confirm this interpretation, as do the relevant antecedents of the Treaty of Limits and the circumstances of its conclusion.

(3) Costa Rica is entitled to navigate with public vessels manned by Costa Rican officials carrying their normal arms on that part of the San Juan where navigation is common, in exercise of its right of communication through the San Juan and in order to protect its freedom of navigation, to safeguard the River and to

defend the boundary areas as well as the common Bay of San Juan del Norte.

(4) Costa Rican vessels exercising the perpetual right of free navigation are entitled to fly the Costa Rican flag and cannot be obliged to hoist the Nicaraguan flag as a condition for that exercise.

(5) There is a consistent practice – recognised by Nicaragua – allowing the inhabitants of the right bank of the San Juan to fish for subsistence purposes, which has created a customary right to such fishing.

(6) The conventional right to land on the Nicaraguan bank cannot be restricted by regulations which effectively deprive the right of any practical effect.

(7) The Agreement of 9 January 1956, concluded pursuant to Article IV of the Pact of Amity, of 21 February 1949, imposes an autonomous obligation on Nicaragua to facilitate and to expedite traffic on the San Juan River.

(8) Any attempt by Nicaragua to deny Costa Rica's rights by considering them as representing a simple "border courtesy" dependent on the goodwill of Nicaragua has no basis and must be rejected.

4 Nicaragua has violated Costa Rica's navigational and related rights in respect of the San Juan, and those violations are continuing. Further and severe restrictions were imposed on Costa Rican navigation after Costa Rica filed the Application in the present case. Restrictions include:

(1) the obligation to land on the Nicaraguan bank and payment for a "departure clearance certificate";

(2) the imposition of other charges including tourist and immigration fees and searches of Costa Rican vessels and their passengers;

(3) a prohibition on navigation by Costa Rican police, and restrictions on navigation by other Costa Rican officials, with serious implications for the provision of health and social assistance and education to inhabitants of the Costa Rican bank;

(4) timetables restricting Costa Rican navigation;

(5) limitations on the places on Costa Rican territory which can be visited when navigating the San Juan and on the duration of those visits;

(6) requirements to fly the Nicaraguan flag when navigating on the San Juan; and
(7) prohibition of fishing for subsistence purposes.

5 Nicaragua's argument that Costa Rica has acquiesced in these restrictions is without foundation.

6 Costa Rica requests appropriate remedies as a consequence of the internationally wrongful acts committed by Nicaragua, in particular:

(1) a declaration of the extent of Nicaragua's violations of its obligations;
(2) the cessation of the internationally wrongful acts that continue to be committed by Nicaragua;
(3) reparation by Nicaragua for damage caused as a result of those violations, the amount to be assessed, if necessary, in a separate phase of the proceedings; and
(4) appropriate guarantees of non-repetition by Nicaragua of its wrongful conduct.

These remedies are appropriate and Costa Rica's request for them admissible. In particular, since the case concerns rights of Costa Rica as a State under treaties and other instruments binding on the parties, Costa Rica's application is not brought within the framework of diplomatic protection, and there is no requirement to exhaust local remedies (if any exist) in Nicaragua. Rather, Costa Rica asserts its own claims, basing them on the injury which "*it has itself suffered, directly and through its nationals*" as a result of the violations by Nicaragua.[597] As to assurances and guarantees of non-repetition, Costa Rica's request that the Court order these is appropriate since Nicaragua's violations of its navigational and related rights are consistent, deliberate and continuing. In the circumstances Costa Rica has every "reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily".[598]

7 On the other hand Nicaragua's request for a declaration bears no relation to the actual dispute between the parties and should be rejected.

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[597] *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), Judgment*, ICJ Reports 2004, p. 12, 35-36 (para. 40) (emphasis in original).

[598] *LaGrand (Germany v. United States of America)*, ICJ Reports 2001, p. 466, 512 (para. 123).

SUBMISSIONS

1. For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying to Costa Rica the free exercise of its rights of navigation and related rights on the San Juan.

2. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has violated:

- (a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;
- (b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;
- (c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;
- (d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;
- (e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;
- (f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;
- (g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award;

(h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;

(i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

3. Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

(a) immediately to cease all the breaches of obligations which have a continuing character;

(b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua's obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and

(c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.

4. The Court is requested to reject Nicaragua's request for a declaration.

Agent of Costa Rica
15 January 2008

Appendix: Some Historical Issues

A.01 In its Counter-Memorial, Nicaragua complains that Costa Rica has misrepresented historical facts, but it presents little or no evidence in support of its own allegations. This Appendix addresses Nicaragua's approach to the following historical issues:

(A) whether the San Juan belonged exclusively to any of the Provinces during the Spanish period: Costa Rica establishes that it did not (see below, paragraphs A.02-A.14);

(B) to what extent the issue of Nicoya was a live point for negotiation in concluding the Treaty of Limits, 1858: Costa Rica establishes that it was not (see below, paragraphs A.15-A.22);

(C) whether there is relevant discrepancy in the territorial descriptions of Costa Rica as between the 1825 Constitution and that of 1841: Costa Rica establishes that there was not (see below, paragraphs A.23-A.28);

(D) whether Costa Rica participated alongside Nicaragua in canalization contracts and agreements at the time of the Treaty of Limits: Costa Rica establishes that it did so participate (see below, paragraphs A.29-A.32);

(E) whether Costa Rica engaged in official navigation on the lower San Juan after 1886: Costa Rica establishes that it did engage in such navigation (see below, paragraphs A.33-A.44);

A. The lower San Juan River and its mouths

A.02 In its Memorial, Costa Rica claimed that the San Juan did not belong exclusively to any of the Provinces during the Spanish period.[599] Nicaragua disputes this, arguing that the Royal Charter given to Diego de Artieda on 1 December 1573 gave the mouths of El Desaguadero to Nicaragua, and that this situation remained unchanged until 1821.[600]

A.03 The Order issued on 17 May 1561 by the Captaincy General of Guatemala, by order of the King of Spain, naming Licentiate Juan Cavallón the

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[599] CRM, para. 2.08.

[600] See NCM, para. 1.2.11.

Major of the Province of Nueva Cartago and Costa Rica, set down the following limits for that Province:

> "…as far as the boundary of the city of Natá and its jurisdiction, in the Kingdom of Tierra Firme, otherwise called Castilla del Oro, and then along this line to the limits of the Dukedom of Veragua, and from the Southern Sea to the Northern Sea up to *the Desaguadero, this being included…*"[601] (Emphasis added.)

A.04 In relation to the San Juan, the limits in the 1561 Order were similar to those established by the 1540 Royal Charter to Diego Gutiérrez.[602] The 1561 Order provided that the San Juan (i.e. the Desaguadero) would be part of Costa Rica, as the order states "until El Desaguadero inclusive".[603]

A.05 In its Counter-Memorial Nicaragua claims that the 1573 Royal Charter "established very clearly that 'the mouth of the Desaguadero (San Juan River)... belongs to Nicaragua...'"[604] But it fails to explain significant contradictions in the 1573 Charter. Paragraph 5 of the Charter provided that Diego de Artieda's conquest would commence "…on the northern part, from the mouths of the Desaguadero..."[605] Clearly these mouths were included: the Royal Charter uses the word "desde", meaning "from", which is an inclusive term. This paragraph did not stipulate that the mouth of the El Desaguadero was part of Nicaragua. Paragraph 12 of the Royal Charter has a similar reading, with the exception that after the words "El Desaguadero" it added the words "that is to the parts of Nicaragua".[606] As noted above, the additional wording is not included in paragraph 5 of the Charter.

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[601] See CRM, Annexes, Vol 2, Annex 3.

[602] See CRM, Annexes, Vol 2, Annex 1.

[603] CRM, Annexes, Vol 2, Annex 3.

[604] See NCM, para. 1.2.11; see also NCM, para. 1.2.3..

[605] NCM, Vol II, Annex 86, p. 303. Paragraph 5 of the Royal Charter stipulated: "…And once you arrive there, you (sic) offer to discover the entire coast of the said province, from the mouths of the Desaguadero to the confines of Veragua, in the North Sea, and you will take possession on Our behalf of whatever has not been taken; and you will discover all the inland of the said province up to the South Sea…".

[606] NCM, Vol II, Annex 86, p. 302. Paragraph 12 of the Royal Charter stipulated: "Firstly, we give you license and authority to discover, settle and pacify the aforesaid Province of Costa Rica and other lands and provinces contained therein… …and on the northern part, from the mouths of the Desaguadero, 'ques á las partes de Nicaragua', all across the land, to the Province of Veragua." It should be noted that Costa Rica does not agree with Nicaragua's translation from the Spanish language into the English language of the words "*ques á las partes de Nicaragua*", translated by it as "*that belong to Nicaragua*". Costa Rica considers that those original words correct translation is: "*that is to the parts of Nicaragua*".

A.06 Notwithstanding this contradiction, and assuming that the Royal Charter intended to leave the mouth of the Desaguadero to Nicaragua, the River itself continued to be under Costa Rican jurisdiction in accordance with the 1561 Order, which was not repealed by the 1573 Charter.

A.07 Another possible reading is that Diego de Artieda's conquest would commence from the mouths of the Desaguadero up to the parts of Nicaragua, as set down in the 1540 and 1541 Royal Charters, that is, 15 leagues to the east from Lake Nicaragua, which is consistent with the history of the border.

A.08 On either reading, the 1573 Charter did not stipulate that the entire River belonged to Nicaragua, as the 1561 Charter had clearly stipulated for Costa Rica. Nor did it establish where any new limits of Nicaragua were located. Nor did it establish that the Costa Rican borders were modified, thereby leaving unaltered the limits marked down in the previous Royal Charters. Whatever reading that is given to the 1573 Royal Charter, it cannot be cited to support the conclusion that the River San Juan, in all its extension, came under Nicaraguan jurisdiction.

A.09 No other provision of the 1573 Royal Order established a change of possession over the entire course of the River or a significant change to the relevant boundaries of the provinces, nor any modification as to the rights of navigation and fishing established in the 1540 Royal Charter,[607] nor any changes to the 1561 Order. The rights of the parties in respect of their boundaries and of fishing and navigation remained the same as those set forth in the 1540 Royal Charter, as amended by the 1541 Royal Charter and the 1561 Order.

A.10 Nicaragua's claim to ownership of the entire San Juan is also untenable because the provisions of a 1576 Royal Charter confirm that Nicaragua's territory did not reach as far as the mouths of the Desaguadero. The entire eastern territory of what today is Nicaragua's Caribbean coast and parts of the eastern territory of what today is Honduras were called Nueva Cartago:[608] its limits stretched from the mouth of the Desaguadero to Cape Camaron, bordering with the Province of Honduras.[609] On 10 February 1576 the King of Spain issued a Royal Charter authorising Diego López to conquer and settle the Province of Lataguzgalpa, which included most of the territory formerly within Nueva Cartago. The limits of this Province were set down as follows:

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[607] See CRM, Annexes, Vol 2, Annex 1.

[608] See Sketch Map 4.

> "Firstly. His Majesty will appoint him his Governor and Captain-General of the said Province, which is the whole land included from *the mouth of El Desaguadero to the north up to Cape Camaron*, in the same direction where the Province of Honduras begins, with all the inland territory included therein, *until reaching the boundary and jurisdiction of the Province of Nicaragua* and Nueva Segovia, and what is that of Honduras; and the said Captain Diego Lopez shall have the said Governorship during his lifetime…"[610] (Emphasis added.)

A sketch map showing the Province of Lataguzgalpa is opposite (Sketch Map 4).

A.11 It is clear from the provisions of the 1576 Royal Charter that the Province of Lataguzgalpa included all the land up to the boundary and jurisdiction of Nicaragua. Nicaragua's territory did not reach to the mouths of the Desaguadero, contrary to Nicaragua's Counter Memorial.

A.12 If the 1576 Royal Charter is reviewed alongside the Royal Charter of 1540, as amended in 1541, as well as the Order of 1561, it makes perfect sense, since the limits of the Province of Nicaragua reached only fifteen leagues to the east, following the Desaguadero (San Juan River) from Lake Nicaragua to the Caribbean Sea. Thus, in 1576 the entire Caribbean coast did not belong to Nicaragua, neither did the lower part of the River San Juan, including the mouth of the Desaguadero. Even if the 1573 Royal Charter had intended to allocate the mouth of the Desaguadero to Nicaragua, as Nicaragua claims, the 1576 Royal Charter allocated the territory from the northern bank of the River northwards to the Province of Lataguzgalpa. According to the 1576 Royal Charter, the limits of Nicaragua would be those set forth previously, as established by the 1540 Royal Charter and set out in Sketch Map 4. The River itself as well as the entire coast to the south belonged to Costa Rica, in accordance with the 1540

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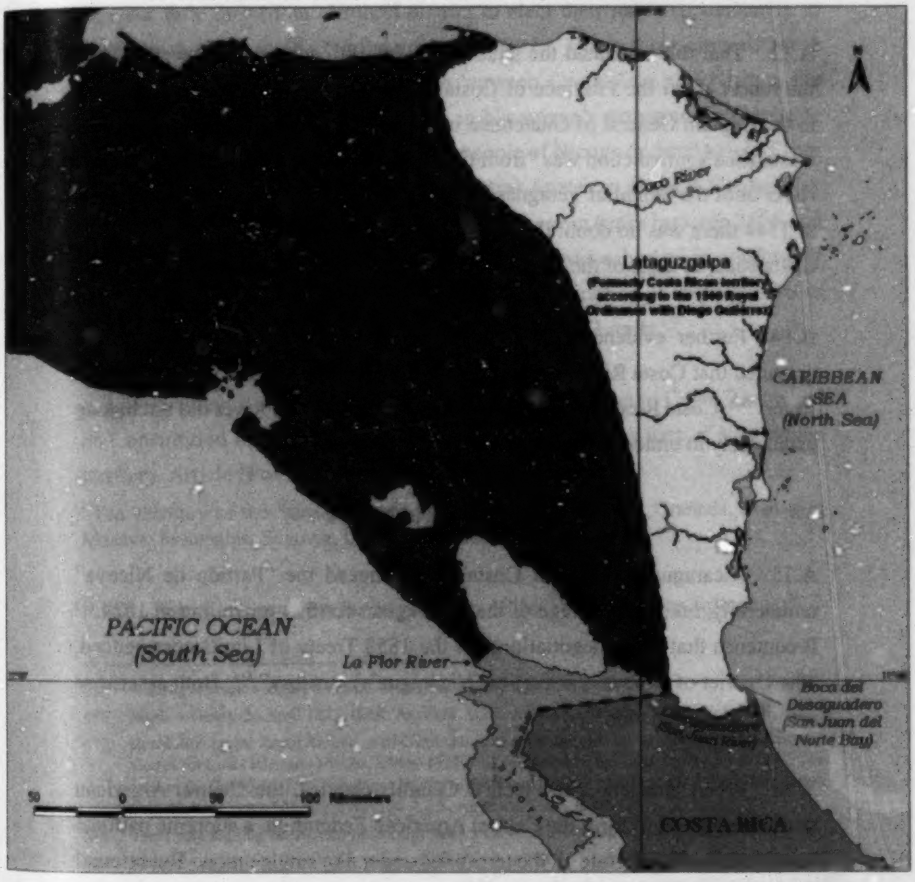
[609] Capitulación con Diego Gutiérrez para la conquista de la Provincia de Cartago, 29 November 1540, in MM de Peralta, *Costa Rica, Nicaragua y Panamá en el Siglo XVI su Historia y sus Límites* (Madrid: Librería Murillo, 1883): CRM, Annexes, Vol 2, Annex 1.

[610] Royal Charter of the King of Spain to Diego López in Archivo de Indias, *Colección de Documentos Inéditos relativos al descubrimiento, conquista y organización de las antiguas posesiones españolas de América y Oceanía, sacadas de los Archivos del Reyno y muy especialment del de Indias*: CRR, Annexes, Vol 2, Annex 1.

Sketch map 4

LIMITS OF COSTA RICA AND LATAGUZGALPA ACCORDING TO THE ROYAL CHARTER OF THE KING OF SPAIN TO DIEGO LOPEZ, 10 FEBRUARY 1576.


Coco River
Lataguzgalpa
(Formerly Costa Rican territory according to the 1540 Royal Ordinance with Diego Gutiérrez)
CARIBBEAN SEA
(North Sea)
PACIFIC OCEAN
(South Sea)
La Flor River
Boca del Desaguadero (San Juan del Norte Bay)
(San Juan River)
COSTA RICA
50 0 50 100 Kilometers

Royal Charter and 1561 Order, unaltered by the 1573 and 1576 Royal Charters. Furthermore, the 1576 Charter established that the Province of Lataguzgalpa included all the land to the north from the northern bank of the San Juan River, thus leaving Costa Rica with the same limits and jurisdiction set down in the Royal Charter of 1540, as amended by the Royal Charter of 1541 and the Order of 1561.

A.13 That this remained the situation in the 18th century can be seen from the report about the Province of Costa Rica presented by Luis Diez Navarro to the Captain General of Guatemala in 1744. This stated that the Province of Costa Rica's jurisdiction was "from the north, from the mouths of the San Juan River until the Shield of Veraguas, at the Kingdom of Tierra Firme…"[611] Thus in 1744 there was no doubt that the mouths of the San Juan River belonged to Costa Rica, as most of the San Juan River.

A.14 Further evidence is found in Costa Rica's 1825 Constitution which provided that Costa Rica's limits on the north were the "mouth of the San Juan River."[612] Costa Rica stands by its claim that the San Juan River did not belong exclusively to either of the Provinces during colonial times.

B. The issue of Nicoya

A.15 Nicaragua claims that Costa Rica annexed the "Partido de Nicoya" unilaterally, taking advantage of the Nicaraguan conflict prevailing in 1824.[613] It contends that when negotiations for the 1858 Treaty of Limits commenced, "the District of Nicoya was part of [Nicaragua's] territory".[614] Both assertions are without foundation.

A.16 When independence reached Central America, the Central American territories agreed to form the Central American Federation, a supreme national body that would integrate all the territories under one single union. But internal struggles and civil war started in Nicaragua as early as 1821, when strife broke out in Nicaragua between the cities of Leon and Granada.[615]

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[611] Report regarding the Province of Costa Rica, presented by Luis Diez Navarro to the Captain General of Guatemala, *Revista de los Archivos Nacionales*, Año II-setiembre y octubre de 1939- No. 11 y 12: CRR, Annexes, Vol 2, Annex 28, p.581.

[612] See NCM, para 1.2.15; CRM, Annexes, Vol 6, Annex 193, p. 769.

[613] NCM, para. 1.2.4.

[614] NCM, para. 1.2.49.

A.17 By 1824 the fate of the districts that were once under one single jurisdiction became an issue to be decided by each of those districts.[616] There had been a close relation between Costa Rica and the "Partido de Nicoya", to the point that together they formed an electoral district to elect their joint representative to the Spanish Court in 1813[617] and again in 1820.[618] Given those circumstances and the close commercial relationship between Costa Rica and Nicoya, the Nicoyans had no desire to be involved in Nicaragua's struggles. A plebiscite took place on 25 July 1824, whereby the people of Nicoya decided to join Costa Rica.[619] This decision, ratified by the Central American Federal Congress in 1825,[620] was reaffirmed by the people of Nicoya seven times between 1826 and 1854. The integration of Nicoya into Costa Rica was achieved in conformity with international law, peacefully and by the determination of its people, more than 30 years before the negotiations for the Treaty of Limits.

A.18 Nicaragua acknowledged the integration of Nicoya to Costa Rica when its Constitution of 8 April 1826 did not include Nicoya as part of Nicaraguan territory. Article II of that Constitution stated:

> "The Territory of the State embraces the districts of Nicaragua, Granada, Managua, Masaya, Matagalpa, Segovia, Leon, Subtiaba, and El Realejo."[621]

A.19 Nicaragua presents the negotiation of the 1858 Treaty as follows:

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[615] Nicaragua acknowledges this fact: NCM, Introduction, para. 7, p. 3.

[616] Masaya Treaty, 26 April 1823: CRR, Annexes, Vol 2, Annex 3. See also NCM, para. 1.2.4.

[617] Resolution by the Royal Audiencia of Guatemala regarding the election of members of the Spanish Cortes for Costa Rica and Nicoya, 3 May 1813, P. Pérez Zeledón, *Reply to the Argument of Nicaragua on the Question of the Validity or Nullity to the Treaty of Limits of April 15, 1858*, (Washington, D.C.: Gibson Bros, 1887), pp.103-104: CRR, Annexes, Vol 2, Annex 2.

[618] Tabla para facilitar la elección de los diputados a Cortes: CRR, Annexes, Vol 2, Annex 63.

[619] Nicoya Act, 25 July 1824: CRR, Annexes, Vol 2, Annex 64.

[620] Decree of the Central American Congress in 1825, approving the annexation of Nicoya to Costa Rica, P. Pérez Zeledón, *Reply to the Argument of Nicaragua on the Question of the Validity or Nullity to the Treaty of Limits of April 15, 1858*, (Washington, D.C.: Gibson Bros, 1887), p. 192: CRR, Annexes, Vol 2, Annex 5.

[621] Nicaraguan Constitution, 8 April 1826, P. Pérez Zeledón, *Reply to the Argument of Nicaragua on the Question of the Validity or Nullity to the Treaty of Limits of April 15, 1858*, (Washington, D.C.: Gibson Bros, 1887), pp.107-108: CRR, Annexes, Vol 2, Annex 65. It should be noted that this description of Nicaragua's territory did not include the mouth of the San Juan River, the San Juan River as such or any of the territories in the Caribbean Coast.

> "By means of [the 1858] Treaty Nicaragua accepted the Annexation of Nicoya by Costa Rica; Costa Rica for her part recognized that Nicaragua was the entire and sole sovereign of the San Juan River and that her border with Nicaragua did not reach as far as the coast of Lake Nicaragua. In this Treaty Nicaragua also granted limited rights of navigation to Costa Rica in a part of the San Juan River."[622]

The 1858 Treaty of Limits marked the final recognition by Nicaragua of the decision taken by the people of Nicoya – but that had long been an accomplished fact.

A.20 In its presentation of the *quid pro quo* of the 1858 Treaty Nicaragua fails to refer to the context of the ratification of that Treaty, which was intimately connected with the Canalization Convention between Nicaragua, Costa Rica and Félix Belly, signed on 1 May 1858 in Rivas.[623] Article 4 of the Nicaragua-Costa Rica-Belly Convention expressly provided that the boundary between Costa Rica and Nicaragua would be the canal. It stated:

> "Dans le cas où le tracé partant de l'embouchure de la Sapoa sur le lac de Nicaragua, et aboutissant à la baie de Salinas sur le Pacifique, serait reconnu praticable par les ingénieurs, ce tracé sera choisi de préférence par la Compagnie pour aboutir du lac de Nicaragua au Pacifique, et par le fait même, le canal deviendra dans toute sa longueur la limite définitive des États de Nicaragua et de Costa-Rica. Dans le cas contraire, cette limite restera ce qu'elle est aujourd'hui, sauf règlement ultérieur."[624]

As co-sovereigns of the canal, Costa Rica and Nicaragua would evidently both have rights of navigation in the waterway. This is confirmed in Article 25 of the Canalization Convention, which provided that Costa Rica and Nicaragua both could veto navigation in the canal by warships of France, England and the United States:

> "Dès que la neutralité du canal aura été solennellement garantie par un acte émané des trois gouvernements de France, d'Angleterre et des Etats-Unis, l'entrée pourra en être accordée à des navires de guerre par une délibération unanime de ces trois puissances, pourvu que les gouvernements de Nicaragua et de Costa-Rica n'y mettent aucune opposition, et sauf règlement préalable avec la Compagnie concessionnaire."[625]

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[622] NCM, para. 1.2.6.

[623] CRM, Annexes, Vol 2, Annex 8.

[624] Nicaragua-Costa Rica-F Belly, Convention relative to the concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua (Mora-Martínez-Belly), Rivas, 1 May 1858: CRR, Annexes, Vol 2, Annex 12, Article 4.

[625] Nicaragua-Costa Rica-F Belly, Convention relative to the concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua (Mora-Martínez-Belly), Rivas, 1 May 1858: CRR, Annexes, Vol 2, Annex 12, Article 25. This is consistent with the account of Félix Belly, who was present for negotiations of both the 1858 Treaty and the canalization Convention: see F. Belly, *A Travers L'Amérique Centrale: le Nicaragua et le Canal Interocéanique*, Tome Second (Paris: Librairie de la Suisse Romande, 1867), 150-165, esp. 152-5. Pages 150-165 are included as CRR,

A.21 The picture which thus emerges from the negotiations leading to the 1858 Treaty is not at all that of a grant of sovereignty to Nicaragua in exchange for the incorporation of Nicoya into Costa Rica. By 1858 Nicoya was a settled matter and it remained for Nicaragua only to formally accept the incorporation of Nicoya into Costa Rica. Instead, the grant of sovereignty over the San Juan in the 1858 Treaty was balanced against the perpetual right of free navigation to Costa Rica.

A.22 At no stage did Costa Rica seek to conquer and annex any Nicaraguan territory.[626] The incursions into Nicaraguan territory on the part of Costa Rican forces during the Walker War were implicitly authorised by Nicaragua and were essential to the final victory against the Filibusters, a fact subsequently acknowledged by Nicaragua.[627]

C. The 1825 and 1841 Constitutions

A.23 In its Counter Memorial, Nicaragua argues that Costa Rica disregarded the territorial boundaries of its own 1825 Constitution in its 1841 Constitution,[628] and concludes that Costa Rica did not respect the *uti possidetis* set down in its 1825 Constitution. Nicaragua attached a map depicting what it claims is the line drawn by the 1825 Costa Rican Constitution.[629]

A.24 Nicaragua's map does not reflect the limits set forth in the 1825 Constitution. First, it shows a straight line commencing in the mouth of the Colorado River and not in the mouth of the San Juan River, as stipulated by the 1825 Constitution. Second, the straight line terminates at the Tempisque River and not at the Salto River. Third, the Costa Rican 1825 Constitution did not establish the existence of any straight line from the mouth of the San Juan River to the Salto River, as Nicaragua implies. The map marked by Nicaragua is not a Costa Rican map from the 1820s and the limits have been marked by

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Annexes, Vol 2, Annex 66.

[626] NCM, para 1.2.48(e).

[627] See e.g., speech by the President of Nicaragua to the Diplomatic Corps on 14 September 2005: CRR, Annexes, Vol 2, Annex 68: "The solidarity of the Central American brothers –especially that from the Costa Rican brothers- was decisive to achieve the withdrawal of the filibusters". See also CRM, Complete Copies of Certain Annexes, Vol. 3, Annex 207 (b), p. 153.

[628] See NCM, para. 1.2.19.

[629] See NCM, Sketch Map 3.

Nicaragua for the purposes of this case: it is not a contemporary depiction of the boundary.

A.25 Article 15 of the 1825 Constitution laid down the boundaries of Costa Rica as follows:

> "The State's territory will extend, *for now*, from West to East, from the Salto River, which divides it from that of Nicaragua, up to the Chiriquí River, which is the border of the Republic of Colombia, and from North to South, from one sea to the other, *being its limits on the north the mouth of the San Juan River* and the shield of Veraguas, and in the south the mouth of the Alvarado River and that of Chiriquí."[630] (Emphasis added.)

The 1825 Constitution established a temporary delimitation of the territory of Costa Rica. Again, Article 15 established that "The State's territory will extend *for now*...", awaiting a decision by the Central American Federal Congress regarding the integration of Nicoya, integration that had been approved by the people of Nicoya six months before the drafting of the Constitution, a fact that Nicaragua omits to mention. At the time of the adoption of the 1825 Constitution the integration of Nicoya within Costa Rica had yet to be ratified by the Federal Congress. The Federal Congress Decree of 9 December 1825, issued 11 months after Costa Rica's Constitution, agreed that Nicoya should remain part of Costa Rica.

A.26 By 1840, the Central American Federation was dissolved, Nicaragua being the first state to withdraw from the Federation in 1838. The legal situation of Nicoya remained the same as in 1825. Considering this fact, the 1841 Constitution included Nicoya as part of the territory of Costa Rica, as stipulated by the Federal Congress in 1825. There is no contradiction between the 1825 and the 1841 Costa Rican Constitutions.

A.27 As to the limits of Nicoya, it was clearly understood that it reached up to the La Flor River and Lake Nicaragua.[631] Nicaragua had recognised that the La Flor River was the limit between Nicaragua and Nicoya--by now part of Costa Rica--when its Legislative Assembly stipulated that "[t]he road between the city of Rivas in Nicaragua and the District of Nicoya shall be repaired, *as far as the river called La Flor*" (emphasis added).[632]

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[630] CRM, Annexes, Vol 6, Annex 193, p. 769.

[631] Report regarding the Province of Costa Rica, presented by Luis Diez Navarro to the Captain General of Guatemala, 1744: CRR, Annexes, Vol 2, Annex 28, p.580.

A.28 None of Nicaragua's Constitutions of this period indicated the extent of Nicaraguan territory or where its boundaries lay, and none made any reference to the San Juan River. The Nicaraguan Constitutions only stated that its limits to the south were with Costa Rica.[633]

D. Negotiations for an inter-oceanic canal

A.29 Nicaragua contends that Costa Rica did not participate in canalization and transit contracts in respect of the San Juan: rather "Nicaragua acted as exclusive territorial sovereign and administrative grantor, without any participation whatsoever by the Republic of Costa Rica."[634] In its view, Costa Rica's claim that it participated as a party, solely or jointly, in canal contracts and treaties "lacks any historical or documentary support".[635] Nicaragua's attempt to misrepresent Costa Rica's participation in canal treaties and contracts is intended to undermine its claim to a perpetual right of free navigation recognised by the relevant instruments, including the 1858 Treaty of Limits.

A.30 Costa Rica's participation in various canal contracts and treaties can be seen in documents produced to the Court, some of which have been cited by Nicaragua. For example, Costa Rica was party to the Montealegre-Jiménez Inter-Oceanic Canalization Treaty of 1º June 1869,[636] by which it adhered to the Ayón-Chevalier Contract for the excavation of an inter-oceanic canal.[637] It provided a right for Costa Rica to open roads and navigate rivers in Nicaraguan territory for the purposes of transport, such opening and navigation not to be impeded by Nicaragua "in any way whatsoever".[638] An extension of Costa Rica's rights of navigation to the entirety of the River was provided for in

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[632] See CRM, Complete Copies of Certain Annexes, Vol. 3, Annex 207(b), p.115 and see also p. 150. See also Sketch Map 4 in CRR.

[633] See CRM, Complete Copies of Certain Annexes, Vol. 3, Annex 207(b), p. 107.

[634] NCM, para. 1.3.13; see also paras. 1.2.48-1.249

[635] NCM, para. 1.2.48.

[636] NCM, Vol II, Annex 8, pp. 29-31. See also CRM, Annexes, Vol 2, Annex 13.

[637] See CRM, Annexes, Vol 2, Annex 11.

[638] See NCM, Vol II, Annex 8, Article 12.

Article III of the Costa Rica-Nicaragua Cordero-Zuñiga Convention of 5 April 1940.[639] In addition, the Costa Rica-Nicargua-F. Belly Convention, referred to above, clearly provided for Costa Rica's participation in the canal project: indeed it provided that the boundary between the two countries would be the canal, clearly recognising navigation rights in the canal for both countries.[640]

A.31 In addition, several of the contracts and treaties to which Nicaragua is a party provide express recognition of Costa Rica's rights, including rights of navigation. For example, the Cass-Irisarri Treaty of 16 November 1857 provided:

> "Article XX: It is understood that nothing contained in this treaty shall be construed to affect the claim of the government and citizens of the Republic of Costa Rica to a free passage by the San Juan River for their persons and property to and from the ocean."[641]

Costa Rica's rights were also expressly reserved in the Bryan-Chamorro Convention between Nicaragua and the United States.[642]

A.32 Costa Rica entered into various contracts without Nicaragua's participation, such as the Webster and Harris-Escalante Contract, between the government of Costa Rica, a British subject and a United States citizen, granting rights of navigation and transport.[643]

E. Costa Rican navigation on the San Juan River after 1888

A.33 Nicaragua argues that there is no record of Costa Rican navigation on the lower San Juan by Costa Rican vessels of the revenue service after 1886.[644]

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[639] CRM, Annexes, Vol 2, Annex 22, Article III.

[640] See above, paras. A.19-A.21; Nicaragua-Costa Rica-F Belly, Convention relative to the concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua (Mora-Martinez-Belly), Rivas, 1 May 1858: CRR, Annexes, Vol 2, Annex 12, Articles 4 and 25.

[641] United States-Nicaragua, Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), Washington DC, 16 November 1857: CRR, Annexes, Vol 2, Annex 10. For discussion of the mistranslation of Article XX by Nicaragua, see above, paragraphs 1.11-12. See also Great Britain-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lennox Wyke-Zeledon), Managua, 11 February 1860: CRR, Annexes, Vol 2, Annex 15; and France-Nicaragua, Treaty of Friendship, Commerce and Navigation (Sartiages-Maximo Jerez), Washington DC, 11 April 1859: CRR, Annexes, Vol 2, Annex 14.

[642] CRM, Annexes, Vol 2, Annex 20.

[643] See NCM, Vol II, Annex 16.

[644] See NCM, para. 4.2.17.

Although Costa Rica's perpetual right of free navigation is not dependent upon actual exercise or use,[645] Costa Rica has provided evidence that it did indeed exercise those rights.

A.34 The 1888 Cleveland Award itself constitutes clear evidence of this. The navigation of its Revenue Service cutters was one of the central issues of the arbitration: the arbitrator found in favour of Costa Rica in respect of the right of Costa Rican Revenue Service vessels to navigate on the San Juan.[646] Costa Rica's right of navigation was reaffirmed in the 1916 Judgment of the Central American Court of Justice, including a right of navigation with vessels of the revenue service.

A.35 The navigation of Costa Rican public vessels on the San Juan after 1888 was demonstrated by Costa Rica in its Memorial.[647] Of particular relevance was the trip taken by the Vessel *Adela* in 1892.[648] Reports detailing navigation of vessels of the Costa Rican Revenue Service in the San Juan after the Cleveland Award were annexed. Reports for the years 1906,[649] 1908[650] and 1909[651] describe activities carried out by the Costa Rican Revenue Service in the area of the San Juan River and include evidence of navigation on the River.

A.36 Further reports from the 20th century evidencing Costa Rican navigation on the San Juan are annexed to this Reply. Reports by the Revenue Guard of Rosalía, a post located on the San Carlos River in Costa Rican territory, provide evidence of the activities carried out by that post in the San Juan area. Thus, the Report to the Deputy Inspector of the Revenue on 20 October 1915 states:

"...The operational service between passed 21st to the 20th present was as follows: September 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 only daily and nocturnal service.

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[645] See Article 6 of the 1858 Treaty of Limits: CRM, Annexes, Vol 2, Annex 7(b).

[646] See CRM, Annexes, Vol 2, Annex 16.

[647] See CRM, Annexes, Vol 6, Annexes 210 and 216.

[648] See CRM, paras. 4.85, 4.86 and CRM, Annexes, Vol 6, Annex 209. As noted in this Reply, Nicaragua misrepresented this incident in NCM; Costa Rica's explanation of the *Adela* incident is above, paragraph 1.15. Sketch Map 1 to this Reply demonstrates the journey taken by the *Adela*.

[649] See CRM, Annexes, Vol 6, Annex 214.

[650] See CRM, Annexes, Vol 6, Annex 215.

[651] See CRM, Annexes, Vol 6, Annex 216.

October 1, an assignment by Arturo Gonzalez and Zacarias Esquivel, departed to Boca the Rio San Carlos, returning without incident on the 3rd…"[652]

A report from the same post of 18 December 1915, also states:

"…The operations that took place between the past 20th to the 18th present were as follows:…
30th at 6 am a task force departed to Muelle de San Carlos, formed by the guards Eliseo Villalobos and Ismael Trejos…
15th a task force formed by the guards Raf Fallas and Ismael Trejos departed to Buena Vista…
20th a mail assignment by Raf Fallas departed…"[653]

A.37 These reports also illustrate the traffic of vessels at the time, both between Costa Rican towns as well as between Costa Rican and Nicaraguan towns. The traffic on the River included the transportation of passengers. The log of 20 October 1915 states:

"…Oct. 4th at 3pm a boat docked coming from San Juan del Norte guided by Ester Arce. Crew: Ambrosio Jirón and José Castillo. Departed to Aguas Zarcas, without cargo.
[Oct] 4th at 2 pm a boat docked coming from Sarapiquí, guided by Mr. Leslie E. Lynn, a crew member and three passengers…"[654]

A.38 Another sample of the official records from 1968 show the various task force activities performed by the Revenue Guard at Boca del Rio San Carlos post. The Report of 5 August 1968 to Captain Jorge Gamboa detailed the following activities:

"I herewith allow myself to inform you about the assignments carried out during the month of July, complaints filed with the Inspection.-
On 24 July one for the revision of commercial licenses along the San Carlos River.
On 26 July one in El Dorado on the San Juan River, concerning some Ipecac.
On 26 July one in Infiernito concerning some Ipecac.
On 29 July one in Pocosol in relation to the felling of trees…"[655]

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[652] Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 20 October 1915: CRR, Annexes, Vol 2, Annex 31.

[653] Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 18 December 1915, CRR, Annexes, Vol 2, Annex 32.

[654] Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 20 October 1915: CRR, Annexes, Vol 2, Annex 31. See also "Departure Clearance Certificate" issued by the Costa Rican Revenue Guard in Boca del río Sarapiquí, to a private citizen, 6 April 1868: CRR, Annexes, Vol 2, Annex 67(a), which indicates the vessel was carrying 10 passengers. Explanation of the issuance of Costa Rican "departure clearance certificates" is found in CRM, para. 5.07.

[655] Note from the Revenue Guard of Boca de San Carlos to Chief of Personnel of the General Inspectorate of the Treasury, 5 August 1968: CRR, Annexes, Vol 2, Annex 35. Syrup of ipecac (*raicilla* in

A.39 Two of the missions referred to in the Report of 5 August 1968 are detailed further in additional reports. The first states:

"For your information, I am sending a complaint filed in this office by Mr. Pablo Lozano, regarding Ipecac located in the place named INFIERNITO, by the San Juan River. I went to said place in company of the Fiscal Guard MISAEL MURILLO BARBOZA, and indeed there was Ipecac."[656]

The second Report states:

"On Monday 29 July 1968, I went on assignment accompanied by Fiscal Guard MISAEL MURILLO BARBOZA and Mouth of Sarapiquí Park Ranger Mr. RUBEN LAO HERNANDEZ, to the place called POCO SOL by the San Juan River, in order to verify the felling of trees, of approximately two hundred and fifty 'varas', when we arrived to the place we verified that, as had been denounced by Captain Scot of Los Chiles de Grecia, said felling had taken place."[657]

A.40 Samples of other official correspondence from 1991 detail activities undertaken by the Costa Rican police at the time in the area of the San Juan River. A Report to the Minister of Public Security by the Chief of Post of the Border Police in Sarapiquí states:

"I proceed to report the essential needs of the Border Police at Sarapiquí.
SITUATION ...
Section 2:
Perimeter of jurisdiction:...
Hamlets that are serviced by waterway (Sector A): Sarapiqui River, Sucio River, Masaya, Los Arbolitos, Pangola, Los Angeles, La Ceiba, La Trinidad.

Hamlets that are serviced by waterway (Sector B): Ochoa, Palo Seco, Cureña, Isla Morgan, Cureñita, Remolino Grande, Remolinito, Caño Tambor, Caño Copalchí, Boca de Sarapiquí, Boca Las Marías, Boca La Tigra..."[658]

These locations are shown in Sketch Map 3. Many of the aforementioned towns are located on the right bank of the San Juan. Evidently those towns were visited via the San Juan. The Report further states:

"AREA OF JURISDICTION:
Barra del Colorado accounts for a community of about 5,500 inhabitants.

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the original Spanish) was made from "rhizome of the Ipecacuanha plant" and was used for medicinal purposes, variously to induce vomiting and as a cough medicine.

[656] Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 26 July 1968: CRR, Annexes, Vol 2, Annex 33.

[657] Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 29 July 1968: CRR, Annexes, Vol 2, Annex 34. The term "vara" in this context is used as a measuring unit. A "vara" measures 83.59 centimeters.

[658] Costa Rican Police Major, Francisco Cordoba Cordoba, to Costa Rican Minister of Public Security, Luis Fishman Z., Note No. C.D. 0666-91, 19 August 1991: CRR. Annexes, Vol 2, Annex 36.

Our Jurisdiction Area extends approximately for 400 square kilometres.
To travel to the Barra del Colorado Unit, we navigate using an azimuth from south to north, of 180° to 360°, with an approximate distance of 170 kilometres of fluvial course."[659]

A.41 This Report not only reveals the size of one of the communities close to the San Juan; it also reveals the distance from Puerto Viejo de Sarapiqui to Barra del Colorado by boat, through the San Juan, which is the only means to reach that community by waterway.

A.42 Another Note dated 29 April 1992 from Major Francisco Cordoba Cordoba, Chief of Post to Lieutenant Colonel Guillermo Sáenz, Director of the Civil Guard, reports the following:

"In what is called the Deltas (advanced posts) we need to open Delta No. 7, because that is the location of the mouth of the Colorado River and the San Juan del Norte River of Nicaragua, a location with a constant movement of tourists, as well as of immigrants from the neighbouring country of Nicaragua. The Nicaraguan Government has a Park Rangers Post from IRENE, to control Sylvester Flora and Fauna of the area. It has been coordinated with the officials of the Sandinista Army, stationed across Delta No. 8, so that the Park Rangers do not intercept the tourists and Costa Rican farmers who navigate along the Río Colorado and San Juan, so they travel freely, observing the legal conditions in accordance with the navigation treaties between both countries."[660]

This Note shows the early intentions of some Nicaraguan authorities to interfere with Costa Rican navigation, a situation the Costa Rican local authorities had duly informed to the Nicaraguan Army so that the applicable instruments were complied with. It demonstrates the regular transit of tourists on the San Juan. It shows that the Nicaraguan Army was not requiring Costa Rican vessels to stop and report to Nicaraguan authorities, as the Note refers only to stopping effected by Nicaraguan Park Rangers. Costa Rica actually requested the help of Nicaraguan Army officials to prevent impediments to Costa Rican navigation imposed by the Park Rangers. The Costa Rican officials clearly understood that any Nicaraguan authority requiring Costa Rican vessels to stop was a breach of the applicable instruments.

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[659] Costa Rican Police Major, Francisco Cordoba Cordoba, to Costa Rican Minister of Public Security, Luis Fishman Z., Note No. C.D. 0666-91, 19 August 1991: CRR. Annexes, Vol 2, Annex 36.

[660] Costa Rican Police Major and Chief of Post, Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.D.O. 81-92, 29 April 1992: CRR, Annexes, Vol 2, Annex 37.

A.43 Another example is the Report dated 25 May 1992 by Major Francisco Cordoba Cordoba to Colonel Guillermo Sáenz Brenes, Director of the Civil Guard.[661] In that Report it is explained that Nicaraguan farmers demanded that officials from the Costa Rican Ministry of Agriculture and Cattle should come to Nicaragua to discuss an ordinance restricting the importation of agricultural products into Costa Rica, otherwise they would block Costa Rica's free navigation on the San Juan River. It is further stated that the Nicaraguan Army authorities were ready to help and support the Costa Rican authorities in case such threat would materialise. It said that on Thursday 21 May 1992 surveillance was carried out throughout the San Juan, up to Morgan Islands and down to the mouth or entrance to San Juan del Norte.

A.44 This Report evidences the type of activities carried out by the Costa Rican Civil Guard on the San Juan. It confirms the navigation throughout the River for surveillance purposes by the Costa Rican police in discharging its duties as established by Articles IV and VI of the 1858 Treaty of Limits. It shows that such operations were carried out with the full knowledge of the Nicaraguan Army, not because Costa Rica had to inform them, but because the Costa Rican and Nicaraguan authorities worked in close cooperation. Nicaraguan Army officers not only alerted the Costa Rican officials about what the Nicaraguan farmers intended to do, they also offered to cooperate with the Costa Rican authorities, should the Nicaraguan farmers blockade or impede Costa Rican navigation.

F. Conclusions

A.45 This Appendix has demonstrated the following facts, contradicting the positions adopted by Nicaragua in its Counter-Memorial:

(1) During the Spanish period the San Juan River did not belong exclusively to any of the Provinces. Further, Costa Rica's rights of fishing and navigation set forth by the 1540 Royal Charter as amended by the 1541 Royal Charter remained unchanged.

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[661] Chief of Post, Major Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.A. 372-92, 25 May 1992: CRR, Annexes, Vol 2, Annex 38.

(2) The territory of Nicoya was incorporated into Costa Rica in 1824 by the free will and resolution of its people, a decision made in accordance with international law and reaffirmed by the people of Nicoya on seven separate occasions. The limits of Nicoya remained the same as they were before the independence of the Central American Provinces in 1821. This situation was recognised in 1825 by the Federal Congress of Central America which decided that Nicoya would remain under Costa Rican jurisdiction, thus upholding the decision of the people of Nicoya. No changes to the legal framework set up in 1825 were ever introduced by the Federal Congress. Thus, the territory of Nicoya continued to be part of the territory of Costa Rica thereafter, a fact that was merely recognised by Nicaragua in the 1858 Treaty of Limits.

(3) Nicaragua's attempt to present the *quid pro quo* of the 1858 Treaty as a grant of sovereignty to Nicaragua in exchange for the annexation of Nicoya to Costa Rica is a misrepresentation. The 1858 Treaty balanced a grant of sovereignty to Nicaragua against attribution to Costa Rica of a perpetual right of free navigation. The right of navigation was in fact essential to those negotiations, as evidenced by contemporaneous documents and the evident assumption by both Nicaragua and Costa Rica of the likelihood of an inter-oceanic canal along the San Juan.

(4) The Costa Rican Constitutions of 1825 and 1841 reflected the juridical situation of Nicoya and of Costa Rican territory, contrary to what is represented by Nicaragua in its Sketch Map 3.[662] There is no contradiction between the 1825 and 1841 Constitutions: the 1825 Constitution laid down that the limits of Costa Rica were temporary; the 1841 Constitution included the territory of Nicoya, reflecting the juridical status at that time. Nicoya's territory reached up to the La Flor River to the north, a limit recognised by Nicaragua as its border with Nicoya until it was changed by the Treaty of Limits.

(5) Costa Rica participated either solely or jointly in several canalization contracts.

(6) Although Costa Rica's perpetual right of free navigation is not subject to a condition of exercise or use, Costa Rica has demonstrated that it exercised its right of navigation regularly.

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[662] NCM Sketch Map 3.

CERTIFICATION

I have the honour to certify that the documents annexed to this Reply are true copies and conform to the original documents and that the translations into English made by Costa Rica are accurate translations.

Vice Minister Edgar Ugalde Alvarez
Agent of Costa Rica
15 January 2008

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